TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 1941

No. 904 43

JIM DUCKWORTH, APPELLANT,

vs.

THE STATE OF ARKANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED MARCH 31, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 904

JIM DUCKWORTH, APPELLANT,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX.

[fol. 1] **IN THE SUPREME COURT OF ARKANSAS**

JIM DUCKWORTH, Appellant,

vs.

THE STATE OF ARKANSAS, Appellee

PRAECIPE FOR RECORD—Filed March 18, 1941

To the Clerk of the Supreme Court of the State of Arkansas:

In making up the record in the above captioned cause upon the appeal to the Supreme Court of the United States, you will include the following:

1. The entire record sent up from the Circuit Court of Mississippi County, to the Supreme Court of Arkansas.
2. The opinion of the Supreme Court of Arkansas.
3. The decree of the Supreme Court of Arkansas.
4. The Petition for Appeal to the Supreme Court of the United States.
5. The Order Allowing the Appeal.
6. The Jurisdictional Statement.
7. The Assignments of Error.
8. The Citation to the Appellee.
9. The Acknowledgement of Service by the Appellee of the documents relating to the appeal.
10. The Appeal Bond.
11. This Praecipe.

(S.) Harold R. Ratcliff, Cecil Nance, Counsel for Appellant.

[File endorsement omitted.]

[fol. 2] [Caption omitted]

[fols. 3-4] IN THE MUNICIPAL COURT OF BLYTHEVILLE, ARKANSAS, CRIMINAL DIVISION

STATE OF ARKANSAS

vs.

JIM DUCKWORTH

JUDGMENT—December 16, 1940

On the 16 day of Dec. 1940, before Hon. Doyle Henderson, Judge of the Municipal Court of Blytheville, Arkansas,

came the defendant Jim Duckworth, charged with the offence of Transporting Alcoholic Liquor into the State without Permit (Sec. 14177 Pope's Digest). Said defendant being then before the court, in custody of the officer, and after hearing the charge entered a plea of not guilty and announced ready for trial, the witnesses were sworn and the court proceeded with the trial. After hearing all the evidence for and against the said defendant, the court found the said defendant guilty as charged and assessed against him a fine of $500.00 Dollars, and cost of $20.25, and — day's confinement.

Now on this 16 day of Dec., 1940, within apt time comes the defendant, by his attorney, Cecil Nance and H. R. Ratcliff and prays an appeal to the Circuit Court, which is by the court granted, and the appeal bond fixed at $1000.00 Dollars.

The defendant having given the required bond with —— —— and —— —— as sureties thereon, the defendant was ordered released from custody to await his case on appeal.

Clerk's Certificate to foregoing paper omitted in printing.

[fols. 5-6] IN THE MUNICIPAL COURT OF BLYTHEVILLE, ARKANSAS

WARRANT OF ARREST

The State of Arkansas to any Sheriff, Constable, Coroner or Policeman in the State:

It appearing that there are reasonable grounds for believing that Jim Duckworth has committed the offence of Transporting Alcoholic Liquor into the State without Permit (Sec. 14177 Pope's) in the Chickasawba District, County of Mississippi and the State of Arkansas, you are therefore commanded forthwith to arrest him-her and bring him-her before the municipal court, to be dealt with according to law.

Given under my hand, as Clerk of the Municipal Court, Blytheville, Ark., this 12 day of Dec., 1940.

F. Whitworth, Municipal Court Clerk.

Summons as witnesses for the State: E. B. Davis. ——, Municipal Court Clerk.

[fol. 7] IN THE CIRCUIT COURT OF MISSISSIPPI COUNTY, ARKANSAS

AGREED STATEMENT OF THE FACTS

The above entitled cause was submitted to the Court on the following stipulation:

It is agreed and stipulated by and between the parties hereto that Eddie B. David, if present, would testify as follows; to-wit: That he is an Arkansas State Policeman, and that in the discharge of his duty on Wednesday, December 11th, 1940, in the Chickasawba District of Mississippi County, on Highway 61, he stopped a 1940 model Chevrolet truck being driven by the defendant, Jim Duckworth, and which contained 100 cases of liquor; that there was at the time on the truck Arkansas license displayed and upon an investigation and search of the truck he found Mississippi license under the floor mat in the front compartment of the truck. In the glove compartment of the truck he found four half pints of liquor, one of which was opened and a portion gone. There was no Arkansas Revenue liquor stamps or any other state liquor stamps, upon any of the whiskey, either that contained in the cases of that which he found in the front compartment of the truck. There was no stamp of any kind on the whiskey except the United States Revenue stamp. The United States Internal Revenue was affixed to each bottle of whiskey in each instance. That in the possession of the said Jim Duckworth was found an invoice billed to Jack Spiers, Columbia, Mississippi, which invoice is attached hereto and made a part hereof. The truck in question was proceeding southwardly along the highway and actually in motion at the time it was stopped and the driver thereof informed the witnesses that he was en route to Columbia, Mississippi, with the shipment. The witness, if present, would testify that he of his own personal knowledge knows nothing with reference to [fol. 8] the destination of the liquor. He was told by the defendant, Duckworth, that the liquor had been purchased at Cairo, Illinois, and that he did not own the liquor, and was driving for Spiers. Defendant said further that he had made several trips through here with loads of liquor, and that he had no permit of any kind from the Revenue Department of the State of Arkansas. The witness would

further testify that Duckworth told him that he knew that he was hauling liquor in violation of the State law. That the Mississippi plate was a 1941 plate and that it showed use. The witness would testify that the truck was checked for registration and found that the Arkansas license on the truck was issued to Jack Spiers, Columbia, Mississippi, for the 1940 Chevrolet one ton truck, and the truck was correctly licensed under the Arkansas law.

It is agreed and stipulated by and between the parties hereto that Jack Spiers, if present, would testify that he is in the wholesale whiskey business, with place of business known as Club Marion in Columbia, Mississippi. That he holds a Federal Wholesale Liquor Dealer's Permit. That he is the owner of the truck and the whiskey in question. That he sent the defendant, Jim Duckworth, from Columbia, Mississippi, with the truck with instructions to purchase the whiskey which was contained therein at the time of the arrest from a licensed dealer in Cairo, Illinois. That his instructions to Duckworth were to make the purchase of the whiskey in question, and bring the same, together with the truck, to the said Club Marion, at Columbia, Mississippi. That no part of the said whiskey was intended for sale, gift, distribution, or other disposition within the State of Arkansas. On cross examination witness testified that the liquor was intended to be sold in the State of Mississippi in violation of the State laws of Mississippi. That the Mississippi license plate found in the truck was purchased for the particular truck and there was no place [fol. 9] to attach the same on the truck other than by bolting it to the Arkansas plate already on the truck. Both the defendant and the owner of the truck reside in Mississippi and neither has any place of business whatsoever in the State of Arkansas.

Customer's Copy.

Royal Distillers Products

Imported—Domestic

Wines Wholesale Liquor Dealers Liquors

706 Commercial Avenue

Telephone 97.

Cairo, Illinois, December 10, 1940.

Sold to Jack Spiers.
Address: ——.
City: Columbia; State: Miss.
Federal Permit No. —. State Permit No. —.
Shipped Via ——.
Terms: ——.

Cases	Sizes	Brand	Price	Amount
50	½	Paul Jones	18.75	937.50
25	Pts	Paul Jones	18.00	450.00
25	½	O. P. Stock	12.15	303.75
100 Cases			Total	1,691.25

AFFIDAVIT

STATE OF ILLINOIS,
Alexander County, ss:

Affiant (Purchaser or purchaser's agent) states that he has examined the foregoing invoice and that each and every statement contained therein is correct and true, affiant fur- [fol. 10] ther states that he has carefully read this said affidavit, before signing and is acquainted with all the contents of same, affiant further states that the purchaser whose name appears above is the holder of a federal permit or stamp in the state of Mississippi. Affiant further states that all liquors purchased per this invoice are for consumption outside the state of Illinois and will in no instance be sold or otherwise used in the state of Illinois nor will purchaser permit any of liquor to return to Illinois and that all the contents of the above bill will be taken directly to the purchasers place of business as is shown above.

Affiant (Purchaser or purchaser's agent) as shown by signature below hereby swears that the facts that are set forth as above is the whole truth and nothing but the truth.

Signature of Purchaser: —— ——, by —— ——, Agent.

Subscribed and sworn to before me this — day of ——, 194–. —— ——, Notary Public.

Received by ——. No. 532. Federal Stamps Only.

———

[fol.11] Jack Spiers, Columbia, Miss.

50 ½ Paul Jones - C339934 - 340007 - 163 - 018 - 300724 - 232946 - 56 - 898 - 83 - 340158 - 072 - 014 332895 - 88 - 93 - 314710 - 01 - 07 - 08 - 33 - 04 - 05 - 23 - 688 - 91 - 93 - 87 - -730 - 720 - 719 - 32 - 22 - 35 - 36 - 690 - 98 - 712 - 34 - 29 - 24 - 731 - 26 - 706 - NoNo - 694 - 90 - 95 - 92 - 97 - 89.

18.75

25 Pt. Paul - 471075 - 017 - 36 - 71 - 79 - 62 - 44 - 51 - 68 - 64 - 74 - 38 - 37 - 63 - 66 - 76 - 54 - 72 - 14 - 65 - 69 - 29 - 23 - 42 - 70.

18.00

25 ½ Our Private Stock. 23437E - 351 - 68 - 431 - 359 - 436 - 365 - 58 - 361 - 53 - 55 - 43 - 54 - 56 - 47 - 39 - 60 - 30 - 75 - 67 - 52 - 57 - 36 - 66 - 74.

12.15

100
Cases

This was all of the evidence adduced by either the plaintiff or the defendant in the trial of the above entitled cause.

(See Clerk's transcript for judgment and finding of the Court.)

[fol. 12] Thereafter, on the 19th day of December, 1940, the following motion for new trial was filed by the defendant: (See Clerk's transcript for motion and order overruling same.)

Reporter's Certificate to foregoing proceedings omitted in printing.

[fol. 13] In the Circuit Court of Mississippi County

Order Approving Bill of Exceptions—January 4, 1941

And now on this day comes the defendant herein and presents this, his bill of exceptions, to the Judge trying said cause, in vacation, and prays that the same be by the Judge examined and approved; and the Judge, after an examination of same, doth sign and approve said bill of exceptions, and doth order that the same be by the Clerk filed and made a part of the record herein.

In Witness Whereof, I have hereunto set my hand on this the 4 day of January, 1941.

(S.) G. E. Keck, Judge.

[fol. 14] In the Circuit Court of Mississippi County

[Title omitted]

Docket Entries

Date & Term	Orders of Court	Record Vol.	Record Page
12/16/40	Appeal transcript filed.		
Dec. 16, 1940	By agreement of all parties case to be tried before Court without jury. Trial before Court, finding and judgment finding defendant guilty of transporting alcholic liquor into state without permit as charged. Punishment fixed at fine of $500 and costs. Officers directed to release truck and liquor held to defendant.		

[fol. 15] In the Circuit Court of Mississippi County

State of Arkansas

vs.

Jim Duckworth

Judgment—December 16, 1940

On this the 16th day of December, 1940, the above entitled matter coming on to be heard on the appeal of Jim Duckworth from the Municipal Court of Blytheville, Arkansas, comes the plaintiff by its attorney, Bruce Ivy, and comes the defendant by his attorneys, Cecil Nance and H. R. Ratcliff; and by agreement this cause is submitted before the Court sitting as a jury, said cause being heard upon the stipulations of witnesses' testimony and argument of counsel, and the Court after having heard same finds:

That the defendant is guilty of transporting alcoholic liquors through the State of Arkansas without a permit as charged and is guilty of violating Section 14177 of Pope's Digest of the Statutes of Arkansas; and the defendant's punishment is fixed at a fine of Five Hundred and no/100 ($500.00) Dollars and costs; and that the defendant's cargo of whiskey consisting of one hundred (100) cases is hereby released from the custody of the sheriff of Mississippi County, Arkansas.

It is therefore by the court considered, ordered and adjudged that the defendant, Jim Duckworth, be and he is hereby fined the sum of Five Hundred and no/100 ($500.00) Dollars and costs, and the Sheriff of Mississippi County, Arkansas, is authorized and directed to release to the said Jim Duckworth the truck and one hundred (100) cases of [fol. 16] whiskey held by the Sheriff of Mississippi County.

G. E. Keck, Judge.

Criminal Record 4, page 117.

[fol. 17] In the Circuit Court of Mississippi County

[Title omitted]

Motion for New Trial—Filed December 19, 1940

Comes the defendant, Jim Duckworth, and moves the Court to set aside the verdict and judgment of the Court

heretofore rendered in this cause, and that he be granted a new trial herein because:

(1) The verdict and judgment are contrary to the law;

(2) The verdict and judgment are contrary to the evidence;

(3) The verdict and judgment are contrary to the law and to the evidence.

(4) There is no evidence to support the verdict and judgment of the Court.

(5) The Court erred in finding the defendant guilty of a violation of Section 14177 of Pope's Digest of the Statutes of Arkansas. That was error because the said Section does not apply to shipments of intoxication liquors originating in Illinois and consigned and en route to Mississippi, which said shipment is passing through the State of Arkansas with no intention to use said whiskey in any manner within the State of Arkansas.

(6) If Section 14177 of Pope's Digest of the Statutes of Arkansas be construed to apply to shipments such as the one here involved, that is, a shipment originating in Illinois, destined for Mississippi and merely passing through the State of Arkansas, then said Section 14177 of Pope's [fol. 18] Digest of the Statutes of Arkansas is unconstitutional and void because the said Section is a conflict with Article I, Section 8, Paragraph 3 of the Constitution of the United States.

(7) The Court erred in finding the defendant guilty of a violation of Section 14177, Pope's Digest of the Statutes of Arkansas, because from all the evidence, the shipment of whiskey involved originating from Illinois was consigned and en route to Columbia, Mississippi, and was merely passing through the State of Arkansas and was interstate commerce between Illinois and Mississippi and the State of Arkansas had not undertaken to and has no authority to regulate, tax, or in any manner interfere with such a shipment of whiskey or levy any tax whatsoever upon same.

(8) The Court erred in finding the defendant guilty of a violation of Section 14177 of Pope's Digest of the Statutes

of Arkansas and assessing the fine therefor because the uncontradicted proof shows that the owner of the shipment involved made application to the Commissioner of Revenues of the State of Arkansas for a permit to transport the said shipment through the State of Arkansas, and said application was by the said Commissioner of Revenues denied.

Wherefore, defendant moves the Court to set aside the verdict and judgment of the Court herein rendered against him, and that he be granted a new trial.

Respectfully submitted, Jim Duckworth, Deft., by C. B. Nance, H. R. Ratcliff, Attorneys for Defendant.

[fol. 19] In the Circuit Court of Mississippi County

[Title omitted]

Order Overruling Motion for New Trial and Allowing Appeal—Filed December 19, 1940

This cause this day came on to be heard upon the motion for a new trial of the defendant, Jim Duckworth, and the Court having heard and considered the same, it is by the Court ordered and decreed that said motion for a new trial be and the same is hereby overruled, to which action of the Court the defendant excepts and prays an appeal to the Supreme Court of the State of Arkansas, which appeal is granted.

And it appearing to the Court that the defendant has deposited with the Clerk the gross sum of Seven Hundred and no/100 ($700.00) Dollars, which is the amount of the appeal bond fixed by the Court, it is by the Court ordered, adjudged and decreed that the appeal stands perfected.

G. E. Keck, Judge.

[fol. 20] Clerk's Certificate of Costs Omitted in Printing

[fol. 21] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 22] IN SUPREME COURT OF ARKANSAS

4205

JIM DUCKWORTH, Appellant,

vs.

THE STATE OF ARKANSAS, Appellee

Appeal from Mississippi Circuit Court, Chickasawba District

JUDGMENT—March 10, 1941

This cause came on to be heard upon the transcript of the record of the circuit court of Mississippi county, Chickasawba District; and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be and the same is hereby in all things affirmed with costs, and that, unless appellant shall, within fifteen juridical days, surrender himself to the proper authority in execution of said judgment, his bond be declared as forfeited.

It is further considered that said appellee recover of said appellant all her costs in this court, in this cause expended and have execution thereof.

Record of Proceedings, vol. C-39, page 481.

[fol. 23] IN THE SUPREME COURT OF ARKANSAS

OPINION—March 10, 1941

GRIFFIN SMITH, C. J.

Jim Duckworth was found guilty of transporting alcoholic liquors through Arkansas without having procured a permit from the commissioner of revenues. He was fined $500.[1]

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[1] The cause originated in the municipal court of Blytheville, where it was alleged that liquor had been transported into the state in violation of § 14177 of Pope's Digest [Act 109, approved March 16, 1935]. The municipal court assessed a fine of $500. The defendant appealed to circuit court.

The judgment recites that the cause was heard[2] "upon the stipulations of witnesses' testimony and the argument of counsel". Essentials of the agreed statement are in the margin.[3]

An appeal involving construction of § 14177 of Pope's Digest was before this court in 1939. Jones v. State, 198 Ark. 354, 129 S. W. 2d 249. In that case the defendant was charged with transporting fifty cases of "taxpaid liquor"[4] from Illinois to Oklahoma by way of Arkansas.

In the instant appeal it is insisted that in the Jones case the right of Arkansas to tax, regulate, or condition interstate shipments was not properly presented.[5] It is also

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[2] A jury was waived.

[3] The state policeman who made the arrest, if called as a witness, would testify that Duckworth was detained Dec. 11, 1940, on Highway No. 61. In the glove compartment of the Chevrolet truck the defendant was driving were found four half pint bottles of liquor, one of which had been opened. It was not full. In the truck were 100 cases of "liquor", upon all of which the federal tax had been paid but the Arkansas tax had not. The truck displayed 1940 Arkansas motor vehicle license plates. License plates issued by the state of Mississippi were found under the floor mat. In Duckworth's possession was an invoice of Royal Distillers Products, Cairo, Illinois, showing sale December 10 of 100 cases of liquor to Jack Spiers, Columbia, Missi., for $1,691.25.

It was further agreed that Jack Spiers, if called, would testify that he is in the wholesale whiskey business at "Club Marion", in Columbia, Miss. He held a federal wholesale liquor dealer's permit and owned the truck driven by Duckworth. He had sent Duckworth from Columbia to Cairo with instructions to purchase the liquor. None was intended for sale, gift, or other distribution in Arkansas. On cross examination the witness would testify that the liquor was intended to be sold in Mississippi in violation of the laws of that state. Duckworth and Spiers resided in Mississippi, and neither had a place of business in Arkansas.

[4] The reference is to federal taxes. The Arkansas strip stamps had not been attached.

[5] The constitutional question in the Jones case was raised and was presented by able counsel.

urged that the Jones case was based upon Haumschilt v. State, 142 Tenn. 520, 221 S. W. 196, and that the Haumschilt case has been overruled by the supreme court of Tennessee.[6]

Counsel for appellant say: "One question, and one only, is presented: that is, Does the state have power to regulate a shipment of liquor which is merely passing through Arkansas in interstate commerce"?

Our answer is that the state does have such right.

In McCanless, Commissioner, v. Graham (Tennessee Supreme Court) the proceedings were not under the criminal code. The appellant, engaged in interstate transportation of liquors, was detained on a charge that the commodity was contraband. In the Tennessee chancery court it was held that the statutes[7] did not authorize confiscation of such property. The department of finance and taxation [fol. 24] had issued a license permitting Graham to transport the liquor. After mentioning that the only act engaged in by Graham "which can in any wise be related to [the Tennessee statutes] was that of transporting intoxicating liquors through dry counties of the state", it was said:

"But, under the stipulation, this was a mere incident of interstate transportation, and if the statutes should be construed so as to prohibit such transportation, they would be void because violative of the commerce clause of the United States constitution * * * We are further of the opinion, as was the chancellor, that the seizure was illegal because appellee was engaged in interstate commerce".[8]

Consonant with the Tennessee courts, this court has held (Jones v. State) that liquor in interstate transit is not subject to confiscation.

Since we determined in the Jones case that the Act of March 16, 1935 (Pope's Digest, § 14177) "* * * makes it

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[6] George F. McCanless, Commissioner of Finance and Taxation, v. Grover Graham. Three other cases involving the same question were consolidated. (146 S. W. 2d. 137).

[7] Chapters 49 and 194 of the Public Acts of 1939.

[8] In support of this statement the following cases were cited: United States v. Gudger, 249 U. S. 373, 63 L. Ed. 563; United States v. Collins, 263 Fed. 657; Whiting v. United States, 263 Fed. 477; Preyer v. United States, 260 Fed. 157; Surles v. Commonwealth, 172 Va. 573, 200 S. E. 636.

unlawful for any person to ship or transport, or cause to be shipped or transported, into the state of Arkansas, any distilled spirits from points without the state, *without first having obtained a permit from the commissioner of revenues*,[9] but three questions are to be determined here: Is such regulation reasonable in view of the state's problem in dealing with the manufacture, sale, and transportation of liquor? Is it a burden on interstate commerce? Does "Into" as used in Act 109 mean "into and out of"?

Although in appellant's motion for a new trial it is alleged that application for permission to move the liquor was made of the commissioner of revenues, and refused, the agreed statement contains nothing to this effect. We must assume, therefore, that no such request was made.

Rules of the department of revenues, promulgated by the commissioner under authority of Act 109 of 1935, (in effect during all of December, 1940)[10] provide that "It shall be [fol. 25] unlawful for any person to ship, transport, cause to be shipped or transported into the state of Arkansas any distilled spirits from *points without the state*[11] without having first obtained a permit from the commissioner of revenues, or his duly authorized agent". This regulation is copied almost verbatim from § 5(a) of Act 109. It must be conceded that the Act is somewhat obscure regarding strictly interstate transportation of liquors; but there is a very definite requirement that before shipments may be brought "into the state" from points "without the state" permission of the commissioner of revenues must be obtained. But, it is argued, this section, and other sections of Act 109 dealing with transportation, have reference to liquors brought from without the state intended for intrastate usage; hence, appellant contends, "into" does not mean into and through, but "into and at rest".

First. Other than Act 109 there is no statute dealing with transportation in the sense contemplated by that measure. It must be assumed, therefore, that the general

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[9] Italics supplied.

[10] New rules, effective February 3, 1941, have been published.

[11] The italicized words are underscored in the mimeographed regulations.

assembly intended to cover all requirements, and that the term "into" as used in the Act includes shipments entering the state, but consigned to points within or beyond. This construction is contrary to that of some courts dealing with related transactions, and we adher- to such definition only because it is our belief that the general assembly intended it so, although more appropriate language could have been used.[12]

Second. The commissioner's regulation requiring those proposing to transport liquor through Arkansas to procure a permit is not in excess of authority conferred by the legislature.

Third. The state relies upon Ziffrin v. Reeves[13] to support the commissioner's action, and to sustain the assertion that the regulation does not impose a burden on interstate commerce. In that case it was said by Mr. Justice McReynolds, who wrote the opinion:

"The Twenty-first Amendment[14] sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the commerce clause. With- [fol. 26] out doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Furthermore, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them".

Facts before the court were that the appellant, an Indiana corporation, had continuously received whiskey from distillers in Kentucky for direct carriage to consignees in Chi-

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[12] Contra, see Ryman v. Legg, 176 S. E. 403, 179 Ga. 534; State v. Williams, 61 S. E. 61, 68, 146 N. C. 618, 17 L. R. A., N. S., 299, 14 Ann. Cas. 562.

[13] Ky. 1939, 60 S. Ct. 163, 308 U. S. 132, 84 L. ed. 128.

[14] "Sec. 1. The eighteenth article of amendment to the constitution of the United States is hereby repealed. Sec. 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited".

cago. The Kentucky Alcoholic Beverage Control Law of 1938 restricted the agencies by which whiskey might be transported.[15]

After commenting upon the power of states to prohibit manufacture, sale, and transportation of liquors, and affirming Kentucky's right to condition transportation, the opinion says:

"We cannot accept appellant's contention that because whiskey is intended for transportation beyond the state lines the distiller may disregard the inhibitions of the statute by delivering to one not authorized to receive; that the carrier may set at naught inhibitions and transport contraband with impunity".

It will be observed that § 2 of the Twenty-first Amendment prohibits the transportation or importation of intoxicating liquors *into* any state, territory, etc., *for delivery or use therein*[16] in violation of the laws of the state.

The agreed statement in the case at bar concedes that the liquor carried by Duckworth was not intended for delivery or use in Arkansas.

It is our view that the Ziffrin case is not altogether in point with the controversy here. The Ziffrin corporation proposed to transport into Illinois liquors manufactured in Kentucky. The Supreme Court of the United States predi-

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[15] In sum, counsel for the appellant said: "The complaint charges that the control law is unconstitutional because repugnant to the commerce, due process and equal protection clauses of the federal constitution, in that, under pain of excessive penalties, it undertakes to prevent an authorized interstate contract carrier from continuing an established business of transporting exports of liquors from Kentucky in interstate commerce exclusively. Also: Intoxicating liquors are legitimate articles of interstate commerce unless federal law has declared otherwise. Interstate commerce includes both importation of property within a state and exportation therefrom. Prior to the Wilson and Webb-Kenyon Acts, and the Twenty-first Amendment, the power of the states over intoxicants in both of these movements were limited by the commerce clause. These enactments relate to importations only. Exports remain as always, subject to that clause".

[16] Italics supplied.

cated its holding upon the fact that inasmuch as Kentucky had the right to prohibit the manufacture, transportation, and sale of whiskey, it had, as an incident to its power to prohibit, the right to designate the agencies of transporta-[fol. 27] tion as a class, and to prohibit transportation by any other class. This, it was thought, was not a burden upon interstate commerce. Expressed differently, Illinois had no fundamental right to receive liquors from Kentucky; and lacking that right it could not complain of conditions under which limited transportation was permitted.

In the case at bar the commodity originated in Illinois, and its destination was Mississippi. Arkansas was a mere transportation conduit through which it passed. Appellant might have received a permit if he had applied for it; but, more than eighteen months after this court had held such transportation to be unlawful, he arrogated to himself the right to disregard reasonable legal prerequisites, and now complains that our decision places a burden on interstate commerce.

If we concede that some burden has been placed upon such commerce, the answer is that it may be done.

In the recent case of South Carolina Highway Department v. Barnwell Bros., 303 U. S. 177,[17] it was said: "While the constitutional grant to congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since Wilson v. Black Bird Creek Marsh Co., 2 Pet. 245, and Cooley v. Board of Port Wardens, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by congress. Notwithstanding the commerce clause, such regulation in the absence of congressional action has for the most part been left to the states by the decisions of this court, subject to the other applicable constitutional restraints".

The distinction (mentioned in a footnote to the Barnwell Bros. case and citing Hall v. De Cuir, 95 U. S. 485, and other decisions) is this: "State regulation affecting interstate commerce, whose purpose or effect is to gain for those

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[17] The opinion was handed down February 14, 1938.

within the state an advantage at the expense of those with-
[fol. 28] out, or to burden those out of the state without any corresponding advantages to those within, have been thought to impinge upon the constitutional prohibition even though congress has not acted."

After citing and commenting upon former decisions, the court said: "In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the congress permits because it is an inseparable incident of the exercise of legislative authority, which, under the constitution, has been left to the states".

Cooley v. Board of Port Wardens, referred to by Mr. Justice Stone (who wrote the opinion in the Barnwell Bros. case) held that the mere grant of the commercial power to congress did not of itself forbid states from passing laws regulating pilotage. In one of the headnotes it is said: "The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others different rules in different localities. The power is exclusive in congress in the former, but not in the latter class".[18]

As late as 1935 the Supreme Court of the United States,[19] in a case appealed from the Supreme Court of Alabama, (see footnote)[20] held that state regulations incidentally affecting interstate commerce were not invalid.

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[18] A Pennsylvania law provided that a vessel that neglected or refused to take a pilot should forfeit and pay to the master warden of the pilots, for use of the society for the relief of distressed and decayed pilots, their widows and children, one-half of the amount of the regular pilotage. The law was held to be an appropriate part of a general system of regulations on the subject of pilotage, and could not be considered as a covert attempt to legislate upon another subject.

[19] Clyde Mallory Lines v. Alabama, ex rel. State Docks Commission, 296 U. S. 261.

[20] Headnote to the opinion of the Supreme Court of the United States, after mentioning that art. 1, § 10, cl. 3 of the constitution provides that no state shall, without the consent of congress, lay any duty of tonnage, says that the inhibition embraces taxes and duties which operate to impose a charge for the privilege of entering, trading in, or

In Ouachita Packet Co. v. Aiken,[21] a case originating in Louisiana and decided in 1887, the court said, at pages 447-448: "In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such, interfere with the regulation made by the states, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority".

New York ex rel. Silz v. Hesterberg, Sheriff, 211 U. S. 31, and Geer v. Connecticut, 161 U. S. 519, are of interest and have application.[22]

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lying in port. It was then said in effect that invalidity [of the Alabama statute] under this clause depends upon the basis of the exaction, not upon measure by tonnage. This clause does not prevent a reasonable charge to defray the expense of policing service rendered by the state to insure safety and facility of movement of vessels using the harbors. State harbor regulation, and charges to defray the cost, though they may incidentally affect foreign or interstate commerce, are not forbidden by the commerce clause so long as they do not impede the free flow of commerce or conflict with any regulation of congress".

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[21] 121 U. S. 444. Complainants were owners of steamboats plying between New Orleans and other ports and places on the Mississippi river and its branches in Louisiana. The burden complained of was that the rates of wharfage exacted by the city under state legislative authority for vessels at New Orleans were excessive. Contention was that the charges were unreasonable as wharfage, and in effect a direct burden on commerce. The court said: "The case is clearly within the principal of the former decisions of this court, which affirm the right of a state, in the absence of regulation by congress, to establish, manage, and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce".

[22] In the Hesterberg case the relator, a dealer in imported game, was arrested for unlawfully having in his possession on March 30, 1905, (being within the "closed" season in the borough of Brooklyn, city of New York) a golden plover lawfully filled in England, and grouse lawfully killed in Russia. They were distinguishable from plover and grouse

The true rule to be applied here is that announced in Hayes v. U. S., C. C. A. Okla. 1940, 112 F. 2d 417. The thirteenth headnote is: "Although the Twenty-first Amendment to the federal constitution surrenders to each state the [fol. 29] power to prohibit or condition importations of intoxicating liquor in interstate commerce into the state, the amendment does not surrender power of congress to prohibit or regulate transportation of intoxicating liquor in interstate commerce, and congress has power to enact legislation to execute [the] amendment and to penalize its violation".

In the absence of action by congress there is no doubt of the right of a state to require those engaged in interstate transportation of liquors—those who use Arkansas highways and other state facilities and who receive its police protection while engaged in such commercial pursuit—to procure from the commissioner of revenues a permit conforming to regulations not inharmonious with Act 109 of 1935. No revenue fee may be exacted for the permit, the only charge being that necessary to defray cost of issuance, police inspection, and necessary reports. The commissioner's refusal or failure to promptly comply in reasonable circumstances would be subject to judicial review and immediate compulsion through mandamus.

Affirmed.

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grown in New York. The court said (pp. 40-41): "That a state may not pass laws directly regulating foreign and interstate commerce has been frequently held by the decisions of this court. But while this is true, it has also been held in repeated instances that laws passed by the states in the exercise of their police power, not in conflict with laws of congress on the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws".

In the Geer case (p. 534) it was said: "The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected".

[fol. 30] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 18, 1941

To the Honorable Griffin Smith, Chief Justice of the Supreme Court of the State of Arkansas:

Your petitioner, Jim Duckworth, a resident of the State of Mississippi, respectfully shows

I

Petitioner is the appellant in the above entitled cause.

II

The appeal in said cause was from a judgment imposing a fine of Five Hundred ($500.00) Dollars upon petitioner for the violation of Section 14177 of Pope's Digest of the Statutes of Arkansas, which said section prohibits the bringing of intoxicating liquors into the State of Arkansas without a permit from the revenue department of the State of Arkansas.

III

That on appeal from such judgment by petitioner to the said Supreme Court of the State of Arkansas, such court being the highest court of law and equity in such state in which a decision of the matters in controversy could be had, the judgment appealed from was in all effects affirmed by the final judgment entered in the Supreme Court on the 10th day of March, 1941.

IV

That there is error in the final judgment and record of [fol. 31] proceedings in this cause in the said Supreme Court of the State of Arkansas whereby petitioner is aggrieved in that in the decision and judgment of said court there was drawn in question the validity of a statute of the State of Arkansas, namely Section 14177 of Pope's Digest of the Statutes of Arkansas, on the ground of its being repugnant to or in contravention of Article I, Section 8, Paragraph 3 of the Constitution of the United States and

the decision and judgment of the said Supreme Court of Arkansas was in favor of the validity of such statute.

Wherefore, Petitioner Prays for the allowance of an appeal from the aforesaid final judgment of the Supreme Court of the State of Arkansas against petitioner to the Supreme Court of the United States in order that the decision and judgment of the Supreme Court of the State of Arkansas may be examined and reversed, and further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Arkansas, may be sent to the Supreme Court of the United States, as provided by law.

Petitioner further prays that pending the disposition of the appeal herein prayed to the Supreme Court of the United States, that this Court stay its mandate to the Circuit Court of Mississippi County, Arkansas; that the Court, by appropriate order, fix the security required for said stay.

The errors upon which petitioner claims to be entitled to an appeal are those hereinabove indicated and which are more fully set out in the assignments of error filed herein.

This the 18 day of March, 1941.

(S.) Harold R. Ratcliff, Cecil Nance, Attorneys for Petitioner-Appellant.

[File endorsement omitted.]

[fol. 32] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER ALLOWING APPEAL TO SUPREME COURT OF THE UNITED STATES—March 18, 1941

On this day on reading the petition of Jim Duckworth, the appellant herein, praying for the issuance of an order herein allowing his appeal to the Supreme Court of the United States from the Supreme Court of the State of Arkansas, and it appearing from the said petition and the record of the above entitled cause that there was drawn in question the validity of a statute of the State of Arkansas on the ground that said statute is repugnant to and in conflict with Article I, Section 8, Paragraph 3, of the Constitution of the United States and upon the ground that the said statute

imposes an unreasonable burden upon interstate commerce and it appearing that the decision of this court was in favor of the validity of said statute and that such petition is a proper petition for the issuance of this order,

Now, therefore, it is ordered by the undersigned, the Chief Justice of the Supreme Court of the State of Arkansas, that said appeal be and the same is hereby allowed; and

It is further ordered that the appellant execute to the respondent, the State of Arkansas, his bond with surety to be approved by the undersigned, in the sum of $250.00 conditioned according to law.

[fol. 33] It is further ordered that pending the disposition of this appeal in the Supreme Court of the United States no mandate will issue from this Court to the Circuit Court of Mississippi County, Arkansas, in this cause, the same mandate being stayed pending the appeal herein.

It is further ordered that the Clerk of this Court, within forty days from this date, make and transmit to the Clerk of the United States Supreme Court under his hand and the seal of this Court, a transcript of the record herein containing a true copy of all material parts of the record herein, which shall be designated by praecipe filed with him by any of the parties hereto.

This 18 day of March, 1941.

(S.) Griffin Smith, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 34] In the Supreme Court of Arkansas

[Title omitted]

Assignment of Errors—Filed March 18, 1941

Now comes Jim Buckworth, the appellant above named, and respectfully submits that in the record, proceedings, opinion and decree of the Supreme Court of Arkansas in the cause mentioned in the petition herewith presented there is manifest error in this, to-wit:

I

The Supreme Court of Arkansas erred in affirming the judgment of the circuit court of Mississippi county,

Arkansas, which judgment imposed a fine of five hundred dollars and costs upon the appellant.

II

The Supreme Court of Arkansas erred in holding Section 14177 of Pope's Digest of the Statutes of Arkansas (Act 109 of the Arkansas Acts of 1935) to be valid as against the contention that the statute is repugnant to and in conflict with Article I, Section 8, Paragraph 3, of the Constitution of the United States.

III

The Supreme Court of Arkansas erred in holding that the State of Arkansas has authority to regulate, tax, or otherwise burden a shipment of distilled spirits originating in Illinois, and passing through the State of Arkansas en route to its destination in Mississippi where there is no intention to sell, dispose of or in any manner use any por-[fols. 35-36] tion of the shipment within the State of Arkansas.

IV

The Supreme Court of Arkansas erred in holding the Statute of Arkansas (Sec. 14177 of Pope's Digest of the Statutes of Arkansas, Act 109 of 1935) to be valid as applied to the shipment of distilled spirits here involved. This was error because the Congress of the United States has exclusive power to regulate interstate commerce, the several States having only such powers in this respect as are expressly granted them by the Congress, and the power to regulate a shipment of intoxicants merely passing through the State has not been granted the State, either by amendment to the Constitution of the United States or act of Congress.

For which errors the appellant above named, Jim Duckworth, prays that the said judgment of the Supreme Court of Arkansas be reversed and a judgment ordered in favor of appellant, and for costs.

(S.) Harold R. Ratcliff, Cecil Nance, Attorneys for Appellant.

[File endorsement omitted.]

* * * * * * *

[fol. 37] Cost Bond on Appeal for $250.00 approved and filed March 18, 1941, omitted in printing.

[fol. 38] Citation in usual form filed March 18, 1941, omitted in printing.

[fol. 39] Clerk's Certificate of Lodgment—Omitted in Printing

[fol. 40] Clerk's Return to Order Allowing Appeal—Omitted in Printing

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON, DESIGNATION TO PRINT ENTIRE RECORD AND ACKNOWLEDGMENT OF SERVICE THEREOF—Filed April 8, 1941

Now comes the above named appellant, pursuant to Paragraph 9, of Rule 13, of the Rules of this Court, and states that the points upon which he intends to rely in this Court in this cause are as follows:

Point I

The State of Arkansas has no authority to regulate, tax or otherwise burden a shipment of intoxicating liquors which originates in Illinois and merely passes through Arkansas en route to its destination in Mississippi, where there is no intention to sell, dispose of or in any manner use any portion of the shipment of intoxicants within the State of Arkansas.

Point II

Section 14177 of Pope's Digest of the Statutes of Arkansas (Act 109 of the Arkansas Acts of 1935), as construed by the Supreme Court of Arkansas in this cause, is unconstitutional and void because it is repugnant to and in conflict with Article 1, Section 8, Paragraph 3, of the Constitution of the United States.

[fol. 43] Point III

The several states have no authority to regulate interstate commerce unless that authority is expressly granted to the states either by amendment to the Constitution of the United States or by an Act of Congress. There is neither an amendment to the Constitution of the United States nor any Act of Congress which grants to the State of Arkansas the power to in any manner regulate or impose a burden upon a shipment of intoxicants in interstate commerce where that shipment merely passes through Arkansas en route from its point of origin in Illinois to its destination in Mississippi.

The appellant further represents that the whole of the record, as filed, is necessary for the consideration of this case, except the bond and citation upon this appeal.

Harold R. Ratcliff, Cecil Nance, Counsel for Appellant.

Service of the foregoing statement and designation and receipt of copies thereof acknowledged this 5 day of April, 1941.

Jack Holt, Attorney General of Arkansas. Jno. P. Streepey, Assistant Attorney General of Arkansas, Counsel for Appellee.

[fol. 44] [File endorsement omitted]

Endorsed on cover: File No. 45,253, Arkansas, Supreme Court, Term No. 904. Jim Duckworth, Appellant, vs. The State of Arkansas. Filed March 31, 1941. Term No. 904 O. T. 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~904~~ 913

JIM DUCKWORTH,

Appellant,

vs.

THE STATE OF ARKANSAS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT AS TO JURISDICTION.

HAROLD R. RATCLIFF,
CECIL NANCE,
Counsel for Appellant.

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IN THE SUPREME COURT OF ARKANSAS

JIM DUCKWORTH,

Appellant,

vs.

THE STATE OF ARKANSAS.

Appellee.

JURISDICTIONAL STATEMENT.

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States, the above named appellant files this, his separate statement, disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the decree of affirmance appealed from herein as follows:

I.

Basis Upon Which it is Contended the Supreme Court Has Jurisdiction.

The Supreme Court of Arkansas has sustained a statute of Arkansas against the contention that the said statute is repugnant to and in conflict with Article I, Section 8, Clause 3, of the Constitution of the United States.

II.

Statutory Provision Believed to Sustain Jurisdiction.

The statutory provision believed to sustain the appellate jurisdiction is Section 237 (a) of the Judicial Code; 28

U. S. C. A. 344 (a); the Act of January 31, 1928, 28 U. S. C. A. 861 (a) 861 (b), 45 Stat. 54.

III.

The Statute of the State, the Validity of Which is Involved.

The statute of the State of Arkansas the validity of which attacked by the appellant is as follows: Section 14177 of Pope's Digest of the Statutes of Arkansas (Act No. 109 of 1935, Sec. 5).

> "14177-(a) PERMIT TO TRANSPORT MUST ACCOMPANY SHIPMENT.—It shall be unlawful for any person to ship or transport or cause to be shipped or transported into the State of Arkansas, any distilled spirits from points without the State, without first having obtained a permit from the Commissioner of Revenues, and no railroad company, or express company, or bonded truck company or truck line operating under a certificate or permit issued by the Arkansas Corporation Commission or river transportation company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of said permit showing that payment of such taxes as are required by law have been made shall accompany such shipment. Said permit shall be in such form as may be prescribed by the Commissioner of Revenues, and all such shipments into the State shall be governed by such rules and regulations as may be promulgated by said Commissioner but said railroad or express company or river transportation company shall not be required to obtain any permit to transport distilled spirits but shall be subject to all rules and regulations promulgated by the Commissioner of Revenues.
>
> (b) It shall be unlawful for any person who is permitted by law to manufacture and/or sell and/or transport distilled spirits to transport or cause to be transported distilled spirits by any means of trans-

portation except as may be prescribed by the rules and regulations of the Commissioner of Revenues, other than except such spirits may be transported by truck or wagon from and to freight or express depots, to and from the place or places of business of said permittees and upon the premises of said permittees and from and to one place of business to another place of business of said permittee, provided that the owner of trucks or wagons transporting distilled liquor as aforesaid, excepting trucks and wagons owned and operated by a railroad or express company, or bonded truck company or truck line operating under a certificate or permit issued by the Arkansas Corporation Commission, or a river transportation company, or by the person permitted by law to manufacture and/or sell and/or transport distilled spirits shall produce a permit to engage in said transportation and shall execute a bond satisfactory in amount, form and as to surety, to be approved by the Commissioner or Revenues, conditioned upon the lawful transportation of such spirits."

IV.

Date of Judgment or Decree.

The date of the decree sought to be reviewed herein is March 10, 1941, and the date upon which the application for appeal is presented is March 18, 1941.

V.

Nature of the Case and Rulings of the Court Bringing the Case Within Jurisdictional Provisions Relied Upon.

Under the uncontroverted facts in the case, the appellant was transporting a shipment consisting of 100 cases of whiskey from Cairo, Illinois, to Columbia, Mississippi. In the course of the transportation of this shipment appellant intended to pass through the State of Arkansas and did actually enter the State of Arkansas. There was no inten-

tion to sell, dispose of or in any manner use any of the whiskey in question within the State of Arkansas. The appellant was arrested by State Police of the State of Arkansas on the highway while the truck in which the whiskey was contained was actually in motion and en route to its destination in Columbia, Mississippi. The highway upon which the appellant was arrested is a through direct route from Cairo, Illinois to Columbia, Mississippi (Record 11-12-13. Opinion of the Supreme Court of Arkansas—Note 3).

The challenged statute of the State of Arkansas prohibits the transportation of distilled spirits into the State of Arkansas without first obtaining a permit from the Commissioner of Revenues of the State of Arkansas and another section of the same statute (Sec. 14178 Pope's Digest of Arkansas Statutes—Act 109, Sec. 6, Acts of 1935), levies a tax upon distilled spirits transported into the State of Arkansas.

It being conceded and found by the Supreme Court of Arkansas that the shipment of distilled spirits herein involved was not intended for any use whatsoever within the State of Arkansas, but on the contrary was a through shipment originating in Cairo, Illinois, and consigned to Columbia, Mississippi, the statute in question imposes a tax and an unreasonable burden upon and constitutes a regulation of interstate commerce by the State of Arkansas which is prohibited by Article I, Section 8, Paragraph 3 of the Constitution of the United States.

In its opinion the Supreme Court of Arkansas held the challenged statute valid as against the contention that when applied to the shipment here involved it is repugnant to and in conflict with Article 1, Section 8, Clause 3 of the Constitution of the United States (Opinion, Supreme Court of Arkansas, pp. 1-3-4), and affirmed the judgment of the trial court imposing a fine of five hundred dollars upon the appellant.

VI.

Grounds Upon Which it is Contended the Questions Involved Are Substantial.

The Twenty-first Amendment only prohibits the transportation or importation of intoxicating liquors *into* a state for delivery or use *therein* in violation of the laws thereof.

The only four Acts of Congress dealing with interstate commerce in intoxicants, the Wilson Act (Act of August 8, 1890, 26 Stat. 313, 27 U. S. C. A. 121), the Webb-Kenyon Act (Act of March 1, 1913, 37 Stat. 699, 27 U. S. C. A. 122), the Reed Amendment (Act of February 27, 1919, 40 Stat. 1057, 27 U. S. C. A. 1231) and the Liquor Enforcement Act of 1936 (Act of June 25, 1936, 27 U. S. C. A. 223) use the word "into" as distinguished from through.

The Supreme Court of the United States has defined the word "into" as used in the Federal laws relating to interstate commerce in intoxicants as referring to the state of destination—not a state *through* which the intoxicants pass en route. (*U. S.* v. *Gudger*, 249 U. S. 373, 63 L. Ed. 653.)

Several of the states have followed the reasoning of the *U. S.* v. *Gudger*, holding that there is no authority in the state to regulate a shipment of intoxicants which merely passes through the state in interstate commerce. *McCauless* v. *Graham*, January, 1941, 176 Tennessee —, 146 S. W. (2d) 137 (adv. sheets) *Surles* v. *Commonwealth*, 1939, 172 Va. 573, 200 S. E. 639.

While the precise point here raised has not been decided by the Supreme Court of the United States, the opinion in *Gudger* v. *U. S.* is applicable, and the decision of the Supreme Court of Arkansas is in direct conflict therewith, as well as with the decisions of Tennessee and Virginia.

VII.

Stage of Proceedings and Manner in Which Federal Questions Were Raised.

The Federal question made in this cause was first raised upon the arrangement of the appellant in the Municipal Court of the City of Blytheville, Mississippi County, Arkansas. The question was again raised upon the trial *de novo* on appeal to the Circuit Court of Mississippi County, Arkansas. Original pleadings in criminal cases in Arkansas being oral, the record is silent as to when the Federal question was first raised. The Federal question was again raised in the trial court, the Circuit Court of Mississippi County, Arkansas, by the appellant's motion for a new trial. (R. 8-9.) This motion for new trial contains the following assignments of error:

> "(6) If Section 14177 of Pope's Digest of the Statutes of Arkansas be construed to apply to shipments such as the one here involved, that is, a shipment originating in Illinois, destined for Mississippi and merely passing through the State of Arkansas, then said Section 14177 of Pope's Digest of the Statutes of Arkansas is unconstitutional and void because the said section is in conflict with Article I, Section 8, Paragraph 3 of the Constitution of the United States.
>
> "(7) The Court erred in finding the defendant guilty of a violation of Section 14177, Pope's Digest of the Statutes of Arkansas, because from all the evidence, the shipment of whiskey involved, originating in Illinois, was consigned and en route to Columbia, Mississippi, and was merely passing through the State of Arkansas and was interstate commerce between Illinois and Mississippi and the State of Arkansas has not undertaken to and has no authority to regulate, tax, or in any manner interfere with such a shipment of whiskey or levy any tax whatsoever upon same."

The trial court in general terms overruled the motion for a new trial (R. 10).

The Federal question was again raised in the brief filed on behalf of appellant in the Supreme Court of Arkansas. Under the rules of the Supreme Court of Arkansas, no specific assignment of error is made in the brief or filed with the Court, but the entire brief deals with the Federal question involved.

VIII.

Manner in Which Question Involved Was Passed Upon by the Court.

The Supreme Court of Arkansas held the questioned statute of the State of Arkansas to be valid; held that Arkansas could regulate a shipment of distilled spirits such as the one here involved; and affirmed a judgment assessing a fine of five hundred dollars against the appellant for violation of the challenged statute.

The Supreme Court of Arkansas held that the Arkansas Statute (Section 14177, Pope's Digest of the Statutes of Arkansas—Act 109 of 1935) prohibiting transportation of distilled spirits into the State without a permit from the Commissioner of Revenues and laying a tax upon such transportation applies not only to shipments to points within Arkansas, but also to shipments originating in Illinois consigned to Mississippi and merely passing through Arkansas. The Supreme Court of Arkansas said: "In the case at bar, the commodity originated in Illinois, and its destination was Mississippi. Arkansas was a mere transportation conduit through which it passed." (Opinion, Supreme Court of Arkansas, p. 3.)

The Court also said: "Other than Act 109, there is no statute dealing with transportation in the sense contemplated by that measure. It must be assumed, therefore, that the General Assembly intended to cover all requirements and that the term 'into' as used in the Act includes

shipments entering the State but consigned to points within or beyond." (Opinion, Supreme Court of Arkansas, p. 2.)

The Supreme Court of Arkansas held the challenged statute to be valid as against the contention that it is repugnant to the Commerce Clause of the Constitution of the United States. The Court said: "Counsel for appellant say: 'One question and one only, is presented: that is, Does the State have power to regulate a shipment of liquor which is merely passing through Arkansas in interstate commerce?'

"Our answer is that the State does have such right." (Opinion, Supreme Court of Arkansas, p. 1.) And again: "If we concede that some burden has been placed upon such commerce, the answer is that it may be done." (Opinion, Supreme Court of Arkansas, p. 3.)

Thus the Supreme Court of Arkansas has held that that State may regulate, burden and tax interstate commerce in intoxicants which merely pass through Arkansas.

IX.

Copy of Opinions on Rendition of Judgment.

A copy of the opinion of the Supreme Court of Arkansas, duly certified is hereto attached and appended.

X.

Cases Believed to Sustain Jurisdiction.

Western Turf Ass'n vs. *Greenberg*, 204 U. S. 359, 27 S. Ct. 384, 51 L. Ed. 520; *James Stewart & Co.* vs. *Sadrakula*, 309 U. S. 94, 60 S. Ct. 431, 84 L. Ed. 596.

Respectfully submitted.

(S.) HAROLD R. RATCLIFF,
(S.) CECIL NANCE,
Attorneys for Appellant.

Filed March 18, 1941.
C. R. STEVENSON, *Clerk.*

EXHIBIT "A".

IN THE SUPREME COURT OF ARKANSAS,
March 10, 1941.

No. 143.

DUCKWORTH

v.

STATE

GRIFFIN SMITH, *C. J.*:

Jim Duckworth was found guilty of transporting alcoholic liquors through Arkansas without having procured a permit from the commissioner of revenues. He was fined $500.[1]

The judgment recites that the cause was heard[2] "upon the stipulations of witnesses' testimony and the argument of counsel". Essentials of the agreed statement are in the margin.[3]

---

[1] The cause originated in the municipal court of Blytheville, where it was alleged that liquor had been transported into the State in violation of § 14177 of Pope's Digest. (Act 109, approved March 16, 1935.) The municipal court assessed a fine of $500. The defendant appealed to circuit court.

[2] A jury was waived.

[3] The State policeman who made the arrest, if called as a witness would testify that Duckworth was detained Dec. 11, 1940, on Highway No. 61. In the glove compartment of the Chevrolet truck the defendant was driving were found four half pint bottles of liquor, one of which had been opened. It was not full. In the truck were 100 cases of "liquor", upon all of which the Federal tax had been paid but the Arkansas tax had not. The truck displayed 1940 Arkansas motor vehicle license plates. License plates issued by the State of Mississippi were found under the floor mat. In Duckworth's possession was an invoice of Royal Distiller's Products, Cairo, Illinois, showing sale December 10 of 100 cases of liquor to Jack Spiers, Columbia, Miss., for $1,691.25.

It was further agreed that Jack Spiers, if called, would testify that he is in the wholesale whiskey business at "Club Marion", in Columbia, Miss. He held a Federal wholesale liquor dealer's permit and owned the truck driven by Duckworth. He had sent Duckworth from Columbia to Cairo with instructions to purchase the liquor. None was intended for sale, gift, or other distribution in Arkansas. On cross-examination the witness would testify that the liquor was intended to be sold in Mississippi in violation of the laws of that State. Duckworth and Spiers resided in Mississippi, and neither had a place of business in Arkansas.

An appeal involving construction of § 14177 of Pope's Digest was before this court in 1939. *Jones v. State*, 198 Ark. 354, 129 S. W. 2d 249. In that case the defendant was charged with transporting fifty cases of "taxpaid liquor"[4] from Illinois to Oklahoma by way of Arkansas.

In the instant appeal it is insisted that in the Jones case the right of Arkansas to tax, regulate, or condition interstate shipments was not properly presented.[5] It is also urged that the Jones case was based upon Haumschilt v. State, 142 Tenn. 520, 221 S. W. 196, and that the Haumschilt case has been overruled by the supreme court of Tennessee.[6]

Counsel for appellant say: "One question, and one only, is presented: that is, Does the state have power to regulate a shipment of liquor which is merely passing through Arkansas in interstate commerce"?

Our answer is that the state does have such right.

In McCanless, Commissioner, v. Graham (Tennessee Supreme Court) the proceedings were not under the criminal code. The appellant, engaged in interstate transportation of liquors, was detained on a charge that the commodity was contraband. In the Tennessee chancery court it was held that the statutes[7] did not authorize confiscation of such property. The department of finance and taxation had issued a license permitting Graham to transport the liquor. After mentioning that the only act engaged in by Graham "which can in any wise be related to [the Tennessee statutes] was that of transporting intoxicating liquors through dry counties of the state", it was said:

"But, under the stipulation, this was a mere incident of interstate transportation, and if the statutes should be construed so as to prohibit such transportation, they would be void because violative of the commerce clause of the United States constitution * * *. We are further of the

[4] The reference is to Federal taxes. The Arkansas strip stamps had not been attached.

[5] The constitutional question in the *Jones* case was raised and was presented by able counsel.

[6] *George F. McCanless, Commissioner of Finance and Taxation, v. Grover Graham.* Three other cases involving the same question were consolidated. (146 S. W. 2d 137.)

[7] Chapters 49 and 194 of the Public Acts of 1939.

opinion, as was the chancellor, that the seizure was illegal because appellee was engaged in interstate commerce".[8]

Consonant with the Tennessee courts, this court has held (*Jones* v. *State*) that liquor in interstate transit is not subject to confiscation.

Since we determined in the Jones case that the Act of March 16, 1935 (Pope's Digest, § 14177) " * * * makes it unlawful for any person to ship or transport, or cause to be shipped or transported, into the state of Arkansas, any distilled spirits from points without the state, *without first having obtained a permit from the commissioner of revenues*,[9] but three questions are to be determined here: Is such regulation reasonable in view of the state's problem in dealing with the manufacture, sale, and transportation of liquor? Is it a burden on interstate commerce? Does "Into" as used in Act 109 mean "into and out of"?

Although in appellant's motion for a new trial it is alleged that application for permission to move the liquor was made of the commissioner of revenues, and refused, the agreed statement contains nothing to this effect. We must assume, therefore, that no such request was made.

Rules of the department of revenues, promulgated by the commissioner under authority of Act 109 of 1935, (in effect during all of December, 1940)[10] provide that "It shall be unlawful for any person to ship, transport, cause to be shipped or transported into the state of Arkansas any distilled spirits from *points without the state* [11] without having first obtained a permit from the commissioner of revenues, or his duly authorized agent". This regulation is copied almost *verbatim* from § 5(a) of Act. 109. It must be conceded that the Act is somewhat obscure regarding strictly interstate transportation of liquors; but there is a very definite requirement that before shipments may be brought "into the state" from points "without the state"

[8] In support of this statement the following cases are cited: *United States* v. *Gudger*, 249 U. S. 373, 63 L. Ed. 563; *United States* v. *Collins*, 263 Fed. 657; *Whiting* v. *United States*, 263 Fed. 477; *Preyer* v. *United States*, 260 Fed. 157; *Surles* v. *Commonwealth*, 172 Va. 573, 200 S. E. 636.

[9] Italics supplied.

[10] New rules, effective February 3, 1941, have been published.

[11] The italicized words are underscored in the mimeographed regulations.

permission of the commissioner of revenues must be obtained. But, it is argued, this section, and other sections of Act 109 dealing with transportation, have reference to liquors brought from without the state intended for intrastate usage; hence, appellant contends, "into" does not mean into and through, but "into and at rest".

First.—Other than Act 109 there is no statute dealing with transportation in the sense contemplated by that measure. It must be assumed, therefore, that the general assembly intended to cover all requirements, and that the term "into" as used in the Act includes shipments entering the state, but consigned to points within or beyond. This construction is contrary to that of some courts dealing with related transactions, and we adhere to such definition only because it is our belief that the general assembly intended it so, although more appropriate language could have been used.[12]

Second.—The commissioner's regulation requiring those proposing to transport liquor through Arkansas to procure a permit is not in excess of authority conferred by the legislature.

Third.—The state relies upon Ziffrin v. Reeves [13] to support the commissioner's action, and to sustain the assertion that the regulation does not impose a burden on interstate commerce. In that case it was said by Mr. Justice McReynolds, who wrote the opinion:

"The Twenty-first Amendment [14] sanctions the right of a state to legislate concerning intoxicating liquors brought from without, undeterred by the commerce clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irre-

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[12] *Contra*, see *Ryman* v. *Legg*, 176 S. E. 403, 179 Ga. 534; *State* v. *Williams*, 61 S. E. 61, 68, 146 N. C. 618, 17 L. R. A., N. S., 299, 14 Ann. Cas. 562.

[13] Ky. 1939, 60 S. Ct. 163, 308 U. S. 132, 84 L. Ed. 128.

[14] "Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed. Sec. 2. The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

spective of when or where produced or obtained, or the use to which they are to be put. Furthermore, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them."

Facts before the court were that the appellant, an Indiana corporation, had continuously received whiskey from distillers in Kentucky for direct carriage to consignees in Chicago. The Kentucky Alcoholic Beverage Control Law of 1938 restricted the agencies by which whiskey might be transported.[15]

After commenting upon the power of states to prohibit manufacture, sale, and transportation of liquors, and affirming Kentucky's right to condition transportation, the opinion says:

"We cannot accept appellant's contention that because whiskey is intended for transportation beyond the State lines the distiller may disregard the inhibitions of the statute by delivering to one not authorized to receive; that the carrier may set at naught inhibitions and transport contraband with impunity".

It will be observed that § 2 of the Twenty-first Amendment prohibits the transportation or importation of intoxicating liquors *into* any state, territory, etc., *for delivery or use therein*[16] in violation of the laws of the state.

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[15] In sum, counsel for the appellant said: "The complaint charges that the control law is unconstitutional because repugnant to the commerce, due process and equal protection clauses of the Federal Constitution, in that, under pain of excessive penalties, it undertakes to prevent an authorized interstate contract carrier from continuing an established business of transporting exports of liquors from Kentucky in interstate commerce exclusively. Also: Intoxicating liquors are legitimate articles of interstate commerce unless Federal law has declared otherwise. Interstate commerce includes both importation of property within a State and exportation therefrom. Prior to the Wilson and Webb-Kenyon Acts, and the Twenty-first Amendment, the power of the States over intoxicants in both of these movements were limited by the commerce clause. These enactments relate to importations only. Exports remain as always, subject to that clause".

[16] Italics supplied.

The agreed statement in the case at bar concedes that the liquor carried by Duckworth was not intended for delivery or use in Arkansas.

It is our view that the Ziffrin case is not altogether in point with the controversy here. The Ziffrin corporation proposed to transport into Illinois liquors manufactured in Kentucky. The Supreme Court of the United States predicated its holding upon the fact that inasmuch as Kentucky had the right to prohibit the manufacture, transportation, and sale of whiskey, it had, as an incident to its power to prohibit, the right to designate the agencies of transportation, as a class, and to prohibit transportation by any other class. This, it was thought, was not a burden upon interstate commerce. Expressed differently, Illinois had no fundamental right to receive liquors from Kentucky; and lacking that right it could not complain of conditions under which limited transportation was permitted.

In the case at bar the commodity originated in Illinois, and its destination was Mississippi. Arkansas was a mere transportation conduit through which it passed. Appellant might have received a permit if he had applied for it; but, more than eighteen months after this Court had held such transportation to be unlawful, he arrogated to himself the right to disregard reasonable legal prerequisites, and now complains that our decision places a burden on interstate commerce.

If we concede that some burden has been placed upon such commerce, the answer is that it may be done.

In the recent case of South Carolina Highway Department *v.* Barnwell Bros., 303 U. S. 177,[17] it was said: "While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, and Cooley *v.* Board of Port Wardens, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local

[17] The opinion was handed down February 14, 1938.

character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints".

The distinction (mentioned in a footnote to the Barnwell Bros. case and citing Hall *v.* De Cuir, 95 U. S. 485, and other decisions) is this: "State regulation affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantages to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted".

After citing and commenting upon former decisions, the court said: "In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the congress permits because it is an inseparable incident of the exercise of legislative authority, which, under the constitution, has been left to the states".

Cooley *v.* Board of Port Wardens, referred to by Mr. Justice Stone (who wrote the opinion in the Barnwell Bros. case) held that the mere grant of the commercial power to congress did not of itself forbid states from passing laws regulating pilotage. In one of the headnotes it is said: "The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others different rules in different localities. The power is exclusive in congress in the former, but not in the latter class".[18]

[18] A Pennsylvania law provided that a vessel that neglected or refused to take a pilot should forfeit and pay to the master warden of the pilots, for use of the society for the relief of distressed and decayed pilots, their widows and children, one-half of the amount of the regular pilotage. The law was held to be an appropriate part of a general system of regulations on the subject of pilotage, and could not be considered as a covert attempt to legislate upon another subject.

As late as 1935 the Supreme Court of the United States,[19] in a case appealed from the Supreme Court of Alabama, (see footnote)[20] held that state regulations incidentally affecting interstate commerce were not invalid.

In Ouachita Packet Co. *v.* Aiken,[21] a case originating in Louisiana and decided in 1887, the court said, at pages 447-448: "In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such, interfere with the regulation made by the states, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority".

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[19] *Clyde Mallory Lines* v. *Alabama, ex rel. State Docks Commission*, 296 U. S. 261.

[20] Headnote to the opinion of the Supreme Court of the United States, after mentioning that art. 1, § 10, cl. 3 of the Constitution provides that no State shall, without the consent of Congress, lay any duty of tonnage, says that the inhibition embraces taxes and duties which operate to impose a charge for the privilege of entering, trading in, or lying in port. It was then said in effect that invalidity [of the Alabama statute] under this clause depends upon the basis of the exaction, not upon measure by tonnage. This clause does not prevent a reasonable charge to defray the expense of policing service rendered by the State to insure safety and facility of movement of vessels using the harbors. State harbor regulation, and charges to defray the cost, though they may incidentally affect foreign or interstate commerce, are not forbidden by the commerce clause so long as they do not impede the free flow of commerce or conflict with any regulation of Congress."

[21] 121 U. S. 444. Complainants were owners of steamboats plying between New Orleans and other ports and places on the Mississippi river and its branches in Louisiana. The burden complained of was that the rates of wharfage exacted by the city under State legislative authority for vessels at New Orleans were excessive. Contention was that the charges were unreasonable as wharfage, and in effect a direct burden on commerce. The court said: "The case is clearly within the principal of the former decisions of this court, which affirm the right of a State, in the absence of regulation by Congress, to establish, manage, and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce."

New York ex rel. Silz *v. Hesterberg*, Sheriff, 211 U. S. 31, and Geer *v.* Connecticut, 161 U. S. 519, are of interest and have application.[22]

The true rule to be applied here is that announced in Hayes *v.* U. S., C. C. A. Okla. 1940, 112 F. 2d 417. The thirteenth headnote is: "Although the Twenty-first Amendment to the Federal Constitution surrenders to each state the power to prohibit or condition importations of intoxicating liquor in interstate commerce into the state, the amendment does not surrender power of congress to prohibit or regulate transportation of intoxicating liquor in interstate commerce, and congress has power to enact legislation to execute [the] amendment and to penalize its violation".

In the absence of action by congress there is no doubt of the right of a state to require those engaged in interstate transportation of liquors—those who use Arkansas highways and other state facilities and who receive its police protection while engaged in such commercial pursuit—to procure from the Commissioner of Revenues a permit conforming to regulations not inharmonious with Act 109 of 1935. No revenue fee may be exacted for the permit, the only charge being that necessary to defray cost of issuance, police inspection, and necessary reports. The Commissioner's refusal or failure to promptly comply in reasonable circumstances would be subject to judicial review and immediate compulsion through mandamus.

Affirmed.

[22] In the *Hesterberg* case the relator, a dealer in imported game, was arrested for unlawfully having in his possession on March 30, 1905, (being within the "closed" season in the borough of Brooklyn, city of New York) a golden plover lawfully killed in England, and grouse lawfully killed in Russia. They were distinguishable from plover and grouse grown in New York. The court said (pp. 40-41): "That a State may not pass laws directly regulating foreign and interstate commerce has been frequently held by the decisions of this court. But while this is true, it has also been held in repeated instances that laws passed by the States in the exercise of their police power, not in conflict with laws of Congress on the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws."

In the *Geer* case (p. 534) it was said: "The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected."

Supreme Court of the United States

October Term, 1940

No. 804

JIM DUCKWORTH,

Appellant,

vs.

THE STATE OF ARKANSAS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF ON BEHALF OF APPELLANT.

Harold R. Ratcliff,
Cecil B. Nance,
Counsel for Appellant.

SUBJECT INDEX

TABLE OF CASES CITED

STATUTES CITED

Supreme Court of the United States

JIM DUCKWORTH,

Appellant,

vs.

THE STATE OF ARKANSAS

Appellee,

MAY IT PLEASE THE COURT:

This is an appeal from a judgement of the Supreme Court of Arkansas, rendered on March 10, 1941. The opinion of the Supreme Court of Arkansas is found in 201 Ark. 1123, 148 S.W. (2nd), 656.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked upon the ground that the Supreme Court of Arkansas has sustained a statute of the State of Arkansas against the contention that the said statute is repugnant to and in conflict with

Article 1, Section 8, Clause 3 (the Commerce Clause), of the Constitution of the United States.

STATEMENT OF THE CASE

The appellant, Duckworth, was engaged in transporting whiskey from Cairo, Illinois, to Columbia, Mississippi. He was employed by one Jack Spiers, who was, at the time, engaged in the wholesale whiskey business in Columbia, Mississippi. Spiers held a Federal Wholesale Liquor Dealer's Permit and was the owner of the truck in which the whiskey was being transported. None of the whiskey involved was intended for sale, gift, or other distribution in Arkansas. On the contrary, the whiskey was intended to be sold in the State of Mississippi in violation of the laws of that State. (Record, P. 4)

The appellant, Duckworth, was arrested by an Arkansas State Policeman while he was driving the truck loaded with liquor along a highway in Arkansas, en route from Cairo, Illinois, to Columbia, Mississippi. The whiskey in question bore the United States Internal Revenue stamps but had no Arkansas State tax stamps. Neither the appellant, Duckworth, nor his employer, Spiers, had any permit of any kind from the Commissioner of Revenues of the State of Arkansas, for the transportation of intoxicating liquors. (Record P. 3)

The appellant was arraigned in the Municipal Court at Blytheville, Arkansas, upon a charge of transporting alcoholic liquors into the State without a permit. He entered a plea of not guilty. A fine of $500.00 was assessed by the Court. The appellant thereupon prayed and perfected his appeal to the Circuit Court of Mississippi County, Arkansas. (Record P. 2)

The case was tried in the Circuit Court of Mississippi County, Arkansas, upon an agreed statement of facts. (Record PP. 3 & 4)

The Circuit Court affirmed the judgement of the Municipal Court but ordered the release of the truck and whiskey in question upon the theory that there was no statute of Arkansas authorizing confiscation thereof, (Record P. 8)

The appellant seasonably filed his motion for a new trial, raising the constitutional question presented in this Court. (Record PP. 8-9-10)

This motion for a new trial was, by the Circuit Court, overruled, and the appellant prayed and perfected his appeal to the Supreme Court of Arkansas. (Record P. 10)

The Supreme Court of Arkansas affirmed the judgment imposing a fine upon the appellant. (Record P. 11)

An appeal from the Supreme Court of Arkansas to this Court has been properly prayed and perfected; this Court has noted probable jurisdiction, and the case stands for hearing upon the constitutional questions raised in the State Courts of Arkansas, and here insisted upon.

ASSIGNMENTS OF ERROR WHICH ARE INTENDED TO BE URGED

Assignments of errors Nos. I, II, III, and IV, are intended to be urged in this Honorable Court.

ARGUMENT

The statutes of the State of Arkansas, the validity of

which are challenged, are set forth in full in the Appendix hereto, as are the rules and regulations of the Commissioner of Revenues of the State of Arkansas, made and promulgated under the authority of the challenged statues.

The several sections of Pope's Digest of the Statutes of Arkansas, dealing with intoxicating liquors, are all parts of Act 109 of 1935.

Section 14177 of Pope's Digest (Act 109 of 1935, Section 5), of the Statutes of Arkansas, makes it unlawful for any person to ship or transport into the State of Arkansas any distilled spirits from points without the state without first having obtained a permit from the Commissioner of Revenue. The next section of the Digest of the Statutes of Arkansas levies a tax upon all distilled spirits shipped or transported into Arkansas from points without the state.

Under the rules and regulations of the Commissioner of Revenues, it is impossible for anyone except a common carrier to secure such a permit.

It was the contention of the appellant in the Courts of the State of Arkansas that the questioned statute of Arkansas had no application to a shipment of intoxicants of the character here involved; that is a shipment originating in Illinois and merely passing through Arkansas en route to its destination in Mississippi. It was the further position of the appellant that if the Supreme Court of Arkansas adhered to its construction of the statute announced in *Jones* vs. *State*, 198 Ark. 354, 129 S.W. (2nd) 249, then the Statute is void because it is repugnant to and in conflict with Article 1, Section 8, Clause 3, of the Constitution of the United States.

The appellant contended for a construction of the statute in conformity with the opinion of this Court in *U. S.* vs. *Gudger*, 249 U. S., 373; 63 L. Ed. 653, and in

conformity with the decisions of the Supreme Courts of Tennessee and Virginia, which decisions will be hereinafter cited.

The Arkansas Court rejected that contention and read into the statute the words, "and through", thereby holding that "into" as used in the statute meant "into and through", thus applying the statute to the shipment here involved and refusing to follow *U. S.* vs. *Gudger*, supra, *McCandless* vs. *Graham*, 177 Tenn. —— 146 S.W. (2nd) 137, and *Surles* vs. *Commonwealth*, 172 Va. 573, 200 S. E. 636.

The only question presented to this Court is the validity of the Arkansas Statute as construed by the Supreme Court of Arkansas. It is our contention that the statute is unconstitutional and void because of repugnance to and conflict with the Commerce Clause of the Constitution of the United States.

The issues involved are narrow and all that it is necessary to do to determine these issues is to examine the Constitution of the United States, with reference to the interstate transportation of intoxicants, the decisions of this Honorable Court and those of the courts of last resort of several of the states upon the precise question here presented.

It is, of course, elementary that the power to regulate or burden interstate commerce rests solely in the Congress of the United States. The only exceptions to this rule are those instances where the Congress has seen fit to confer regulatory power upon the several states.

The entire scheme of federal liquor control legislation gives to the state wherein liquor is manufactured or consumed plenary powers of regulation and taxation.

All of the federal liquor control legislation denies to the several states, while serving, in the words of the Supreme

Court of Arkansas, as a "mere transportation conduit," any regulatory powers whatsoever.

The 21st Amendment to the Constitution of the United States was adopted after the decision of this Court in *U. S.* vs. *Gudger,* supra. It must be assumed that the framers of the amendment had that decision in mind. The second section of that amendment is as follows:

> "Sec. 2. The transportation into any State, Territory, or Possession of the United States for delivery or use therein, of intoxicating liquors in violation of the laws thereof, is hereby prohibited."

That section of the amendment uses the word "into" as distinguished from "through" giving to it the meaning stated in the Gudger case. We quote:

> "No elucidation of the text is needed to add cogency to this plain meaning, which would, however, be re-enforced by the context, if there were need to resort to it, since the context makes clear that the word 'into' as used in the statute refers to the state of destination and not the means by which that end is reached—the movement through one state is a mere incident of transportation to the state into which it is shipped."

The Acts of Congress dealing with interstate commerce in intoxicating liquors are the Wilson Act. U.S.C.A. Title 27, Sec. 121, 26 Stat. 313, Webb-Kenyon Act. U.S.C.A. Title 27, Sec. 122, 37 Stat. 699, Reed Amendment, U.S.C.A. Title 27, Sec. 123, 40 Stat. 1057, and the Federal Liquor Enforcement Act. U.S.C.A. Title 27, Sec. 223, 49 Stat. 1928. Not one of these Acts in any way confers upon the state any power whatsoever, to regulate a shipment of intoxicants, which is merely passing through the State. These Acts use the word "into" as distinguished from "through," and nowhere in any of them is there any basis for even a

suspicion that the Congress intended to permit a regulation by a state such as the one here involved.

The result of the decision of the Supreme Court of Arkansas in *Jones* vs. *State*, supra, and in the case at bar is to confer authority upon the Commissioner of Revenues of Arkansas to regulate and control the strictly internal affairs of Mississippi.

The decision in *Jones* vs. *State* was handed down some eighteen months before the transportation here involved occurred. That decision was based upon *Haumschildt* vs. *State*, 142 Tenn. 520, 221 S.W. 196. Prior to the decision in the case at bar, *Haumschildt* vs. *State* had been attacked as unsound and in conflict with the decisions of this Court, in the Supreme Court of Tennessee. That Court overruled and disapproved *Haumschildt* vs. *State* in its opinion rendered in *McCanless* vs. *Graham*, supra. In the unreported opinion in *McCanless* vs. *Spiers*, decided by the Tennessee Court in January, 1941, in which case the transporter of the liquor had no permit, the Tennessee Court refused to make a distinction between interstate transporters holding permits and those who did not. This opinion is found in the appendix hereto.

Arkansas stands alone in her attempt to burden interstate commerce. Certainly the fact that the sale of intoxicating liquors is illegal in Mississippi furnishes no justification for the interference of Arkansas in her affairs.

It should be stated that it is no violation of any federal law to ship or transport whiskey into Mississippi. The Federal Liquor Enforcement Act of 1936, Title 27, Sec. 223 U.S.C.A. 49 Stat. 1928, only prohibits shipment or transportation into a state in violation of her permit regulations, or where the state of destination prohibits the importation of all intoxicants containing more than 4% alcohol by volume. Mississippi has no permit regulations, and

permits importation of liquors containing not more than 4% by weight, which is, of course, a larger alcoholic content than 4% by volume. Therefore shipments such as the one here involved violate no federal statute—*Dunn* vs. *U. S.* 98 Fed. (2nd) 119.

Arkansas seeks to harmonize her decision with those of Tennessee by stating in the opinion in the case at bar,

> "Consonant with the Tennessee Courts, this Court has held (*Jones* vs. *State*) that liquor in interstate transit is not subject to confiscation."

The fallacy of this statement is obvious. The Tennessee statute (Chap. 49 Acts of 1939), provides for the confiscation of liquor unlawfully possessed or transported. There is no provision in the Arkansas Statute whatever for confiscation of illegal liquor. The sole reason the Arkansas Court ordered the return of the liquor involved in *Jones* vs. *State* is the absence of any provision for confiscation from the statute.

When the Supreme Court of Arkansas said in its opinion in the case at bar,

> "In the absence of action by Congress there is no doubt of the right of a State to require those engaged in interstate transportation of liquors * * * to procure from the Commissioner of Revenues a permit * * * ".

it announced as law a ruling which is the exact reverse of the very cornerstone of interstate commerce law; that is that the Congress alone has power to regulate interstate commerce, the states having only such powers as are expressly granted to them by Act of Congress. The only exceptions of which we are aware to this basic principle are those in which the state, in the exercise of its police power over its strictly internal affairs, indirectly and remotely imposes some shadow of a burden upon interstate commerce. The decisions cited by the Arkansas Court to

sustain its position deal solely with cases of this character.

Never has a direct regulation of interstate commerce by a state, without Congressional sanction, been upheld by this Court.

Prior to the enactment of the Wilson Act, the decisions sustaining this view are too numerous and familiar for citation; indeed, those decisions are the father of such Federal legislation as the various liquor control acts, which yield to the states the right to control certain phases of the liquor traffic.

We readily concede that each state has power to absolutely prohibit the manufacture of liquors within its borders and as an incident to that power, prohibit or condition their export from the state—*Ziffrin* vs. *Reeves*, 60 S. Ct. 163, 308 U. S. 132, 84 L. Ed. 128.

We likewise concede that each state has the power to condition or absolutely prohibit the importation into it of all intoxicants, 21st Amendment, Const. U. S., *State Board of Equalization of California* vs. *Young's Market Co. et als*, 57 S. Ct. 77, 299 U. S. 59, 81 L .Ed. 38.

However, we most earnestly insist that there is nothing in the Constitution of the United States, the Statutes thereof, or in the decisions of this Court which sanctions the regulation attempted by Arkansas. The constitution of the United States contains an express prohibition of such regulation. Const. U. S., Art. 1, Sec. 8, Clause 3. Tennessee has held that any such regulation would be unconstitutional and void.

> " • • and if the Statutes should be construed so as to prohibit such transportation they would be void because violative of the Commerce clause of the United States Constitution • • • We are further of the opinion, as was the chancellor, that the seiz-

> ure was illegal because appellee was engaged in interstate commerce. Under the decisions of the Federal Courts alcoholic beverages retain their interstate commerce character until they actually enter the forbidden state. *United States* vs. *Gudger*, 249 U. S. 373, 63 L. Ed. 563; *United States* vs. *Collins*, 263 Fed. 657; *Whiting* vs. *United States*, 263 Fed. 477; *Preyer* vs. *United States*, 260 Fed. 157; *Surles* vs. *Commonwealth*, 172 Va. 573; 200 S. E. 636."

McCanless vs. *Graham*, supra.

Virginia has likewise sustained the position taken by the appellant. After accepting the basic principle of the law of interstate commerce, and in discussing the regulatory powers granted by Congress, to the several states, the Virginia Court has said:

> "None of these Acts, however, contain any suggestion that a state law can operate upon intoxicating liquor as a subject of interstate commerce while being transported through such state."

And again:

> "It may be true, and doubtless is, that no great burden would have been imposed had these defendants been asked to indicate the route which they would take, but if some farmer in Maine wishes to send a truck load of potatoes to California, and if statutes like ours were everywhere in force, he would find it burdensome to mark out in advance the route to be travelled; indeed he might find it impossible."
>
> *Surles* vs. *Commonwealth*,
> 172 Va. 537, 200 S. E. 636.

It requires no fertile imagination to picture the chaos which might ensue should the decision of the Arkansas Court be sustained. If the state has the power to demand a permit from one class of transporter it has the power

to demand it from all. Every automobile, every truck, common carrier or not, every railroad train, every wagon, every boat touching the Arkansas shore, and indeed every person daring to venture into the State of Arkansas is subject to search and possible arrest the moment he or his conveyance touches the soil of Arkansas.

A situation of this character is exactly what Article I, Section 8, Clause 3. Const. U. S. was designed to prevent.

It is our most earnest insistence that the Courts of last resort of Virginia and Tennessee are correct in their determination of the Constitutional question here involved, that *U. S.* vs. *Gudger* is directly applicable here, and that the Supreme Court of Arkansas has erroneously decided the cause for the reasons set forth herein.

We therefore submit that the judgment of the Supreme Court of Arkansas must be reversed.

Respectfully submitted.

HAROLD R. RATCLIFF,

CECIL B. NANCE,

Counsel for Appellant.

APPENDIX

Section 14177—Pope's Digest of Arkansas Statutes (Act 109 of 1935)

"14177—(a) PERMIT TO TRANSPORT MUST ACCOMPANY SHIPMENT.—It shall be unlawful for any person to ship or transport or cause to be shipped or transported into the State of Arkansas, any distilled spirits from points without the State, without first having obtained a permit from the Commissioner of Revenues, and no railroad company, or express company, or bonded truck company or truck line operating under a certificate or permit issued by the Arkansas Corporation Commission or river transportation company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of said permit showing that payment of such taxes as are required by law have been made shall accompany such shipment. Said permit shall be in such form as may be prescribed by the Commissioner of Revenues, and all such shipments into the State shall be governed by such rules and regulations as may be promulgated by said Commissioner but said railroad or express company or river transportation company shall not be required to obtain any permit to transport distilled spirits but shall be subject to all rules and regulations promulgated by the Commissioner of Revenues.

(b) It shall be unlawful for any person who is permitted by law to manufacture and/or sell and/or transport distilled spirits to transport or cause to be transported distilled spirits by any means of transportation except as may be prescribed by the rules and regulations of the Commissioner of Revenues, other than/except such spirits may be transported by truck or wagon from and to freight or express depots, to and from the

place or places of business of said permittees and upon the premises of said permittees and from and to one place of business to another place of business of said permittee, provided that the owner of trucks or wagons transporting distilled liquor as aforesaid, excepting trucks and wagons owned and operated by a railroad or express company, or bonded truck company or truck line operating under a certificate or permit issued by the transportation company, or by the person permitted by law to manufacture and/or sell and/or transport distilled spirits shall produce a permit to engage in said transportation and shall execute a bond satisfactory in amount, form and as surety, to be approved by the Commissioner of Revenue, conditioned upon the lawful transportation of such spirits."

Section 14178—Pope's Digest of Arkansas Statutes (Act 109 of 1935)

"14178—TAX ON DISTILLED SPIRITS SHIPPED INTO STATE—EXCEPTION. Every person who purchases distilled spirits and has same shipped into the State of Arkansas from points without the State, as provided in Section 14177 shall at the time said permit is issued. pay a license tax thereon at the rate of five (5c) cents per proof gallon of such distilled spirits contained in such shipment, provided, however, that with respect to such distilled spirits so shipped into the State as are used for blending, rectifying and mixing purposes, such person so using same shall not be required to pay the tax for the privilege of blending, rectifying or mixing as is provided for in this Act to the extent such distilled spirits so brought into the state is used for blending, rectifying and mixing purposes. Id. S 6."

Rules and Regulations of Commissioner of Revenues.

"REGULATIONS GOVERNING THE TRANSPORTING OF LIQUORS.—1. It is unlawful for any person to ship, transport, cause to be shipped or transported into the State of Arkansas any distilled spirits from *points without the state* without having first obtained a permit from the Commissioner of Revenues, or his duly authorized agent.

2. No Railroad Company, Express Company or Truck Line operating under a permit issued by the Arkansas Corporation Commission, or river transportation companies shall receive for shipment into this state any package or receptacle containing distilled spirits, unless a copy of said permit (from the Commissioner of Revenues or his authorized agent) showing that payment of all lawful taxes have been made and which permit and receipt for taxes shall accompany such shipment. The term 'permit' as herein used shall mean the duplicate copy of wholesalers order marked 'permit' as heretofore authorized and approved by the Commissioner of Revenues, and which describes in detail all liquors to be contained in any shipment. Such permit must be attached to every waybill or bill of lading, and upon delivery of shipment must be attached to duplicate of freight bill and retained by carrier.

3. All truck lines holding certificates issued by the Arkansas Corporation Company, and all river transportation companies, are required to file special application for authority to transport liquors. Upon approval of their application, the Commissioner of Revenues will furnish each such carrier a proper identification card as evidence of their authority to legally transport liquors, provided this section does not apply to railroad and express companies.

4. Pursuant to the authority vested in him by

law, the Commissioner of Revenues will require each eligible trucking company (that is, one duly licensed by the Arkansas Corporation Commission) and hauling liquor from without the State of Arkansas to a point within the State of Arkansas to execute a Surety Bond in the sum of $2,000.00 and in addition thereto must file an application for a permit and secure a permit as above set forth.

5. All carriers operating within the State of Arkansas and transporting liquor from one point within the State of Arkansas to another point within the State of Arkansas are not required to execute a Surety Bond, but must make application with the Commissioner of Revenues for a permit and must secure a permit authorizing them to engage in the business of transporting alcoholic beverages in this State as above set forth.

6. It shall be lawful for permittees to use their own vehicles in hauling liquor from and to freight or express depots and from and to the place of business of said permittees and upon their premises and from one place of business of permittees to another place of business of said permittees.

7. Contract carriers duly licensed as such by the Arkansas Corporation Commission and holding a bona fide contract may transport liquors intrastate from and on behalf of such wholesale dealer with whom he has a contract from the place of business of the wholesaler to and only duly licensed retail dealers of this state or from any depot or freight warehouse or bonded warehouse to the place of business of the wholesaler.

8. Any transportation company damaging any shipment of liquors entrusted to its care and custody, and in any instances where such transportation company settles with the owner of said liqu-

ors for the damage thus suffered and done, shall have the right to sell such damaged liquors contained in such shipment only to a licensed wholesaler doing business in this State. Any such sale must be accompanied by proper invoice.

9. Railroad and Express Companies operating within the State may, without obtaining a permit for such purpose, transport liquors from a duly licensed wholesaler in this State to a duly licensed retailer in this State, and the burden of proving that such liquors are received from and consigned to a duly licensed dealer shall be upon said Railroad or Express Company. All Bills of Lading and receipts must show name of consignor and consignee and their respective permit numbers.

10. All retail dealers are permitted to transport liquors from the warehouse of a duly licensed wholesaler to their respective places of business, but all such liquor transported must be properly stamped, and must be at all times accompanied by proper invoices and permit numbers. All vehicles so used shall have painted on the side of same "Retail Liquor Dealer" and Permit Number.

11. Any licensed whoselaser may transport liquors from his warehouse to the retailer's place of business, provided all such liquor be properly stamped and be accompanied by proper invoices and permit numbers. All vehicles so used shall have painted on the side of same "Wholesale Liquor Dealer" and Permit Number.

12. It shall be the duty of each carrier unloading liquor in his freight house or warehouse to store same separate and apart from any other freight therein contained in order that such liquor may be easily inspected by the Commissioner of Revenues or his duly authorized agent.

13. All Bills of Lading must specifically show size of the container, quantity and brand of liquor or imported wines or ale and beer (in excess of 5%) contained in any car or truck.

14. Imported wines as used in the proceding section means wines manufactured outside the State of Arkansas (containing in excess of 3.2%) and the same restrictions as herein imposed apon the transportation of alcoholic liquors shall apply with equal force and effect to the transportation of imported wines and all requirements herein contained with reference to invoices, permit numbers and all other requirements shall be carried out by any carrier transporting imported wines.

15. Contract carriers holding certificates issued by Arkansas Corporation Commission may transport liquor into the State of Arkansas.

16. Bonded warehouses may deliver liquors only to regular licensed wholesalers and the burden shall be upon said warehouses of knowing that person to whom such liquor is consigned is a duly licensed wholesaler. They may use duly licensed common carriers or contract carriers to transport liquor to duly licensed wholesalers doing business in this State and shall at all times accompany each shipment with proper bills of lading, invoice and other identification showing all information necessary to fully comply with the Alcoholic Control Act and the Rules and Regulations promulgated by the Commissioner of Revenues. All vehicles so used shall have painted on the side of same "Bonded Liquor Warehouse" and number of permit. Before bonded warehouses deliver liquor that is unstamped to wholesale dealers they must require the wholesaler to turn over to them liquor shipping permit, showing stamps have been purchased for liquor so withdrawn from warehouse.

17. Any violation of any rule now or hereafter promulgated by the Commissioner of Revenues shall be deemed sufficient cause for the revocation of any permit.

18. Any bond now or hereafter executed by any surety company on behalf of any carrier licensed to transport liquors under the Alcoholic Control Act may be cancelled upon thirty days notice to the principal in said bond and the Commissioner of Revenues, provided such cancellation shall not release the surety from any liability accruing prior to the date of such cancellation.

19. All the shipments of spiritous, vinous or malt liquors to be paid for on delivery, commonly called 'C.O.D.' shipments, into any County, City, Town, District or Precinct, where said Act is in force shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof:

D. L. FORD,
Commissioner of Revenues.

SUPPLEMENTAL REGULATION NO. 31 PROMULGATED BY THE COMMISSIONER OF REVENUES FOR THE PURPOSE OF CONTROLLING AND REGULATING THE TRANSPORTATION BY CONTRACT OR PRIVATE CARRIER OF SPIRITUOUS LIQUORS FROM A POINT OUTSIDE THE STATE OF ARKANSAS, TO ANOTHER POINT OUTSIDE THE STATE OF ARKANSAS; THIS REGULATION ISSUED PURSUANT TO THE PROVISIONS OF ACT 108 OF THE ACTS OF THE GENERAL ASSEMBLY OF 1935 AS AMENDED, AND ACT 18 OF THE EXTRAORDINARY SESSION OF 1938 AS AMENDED.

Hereafter all shipments of spirituous liquors into and through the State of Arkansas must be by common carrier, which means by railroad, steamboat, or duly authorized truck line having a permit from the Arkansas Corporation Commission, and is duly licensed by the Interstate Commerce Commission, except as follows:

Any contract or private carrier desiring to transport spirituous liquors, upon which all federal taxes and fees have been paid, from a point in a wet state bordering the State of Arkansas, into and through the State of Arkansas, to another point in another wet state bordering the State of Arkansas, said point not necessarily being the point of final destination of said spirituous liquors, shall first file with the Commissioner of Revenues an application for a permit to transport such spirituous liquors through the State of Arkansas, which permit shall state in detail the point of origin of such shipment, the point where such shipment will enter the State of Arkansas, the route or course to be used in transporting such liquors through the State of Arkansas and the point where such shipment will leave the State of Arkansas.

Said application shall also inform the Commissioner of Revenues of the date or day of the week when such shipments will be made into and through the State, the approximate duration of the entire trip through the State, a description of the vehicle or conveyance in which such shipment will be made including motor and Arkansas license numbers, and the quantities, in case lots, of such liquor and, if for more than one shipment, the regularly established schedule that such contract or private carrier intends to follow in making repeated shipments pursuant to such permit.

Such contract or private carrier shall also file with the Commissioner of Revenues a surety bond in the sum of $2,000.00, conditioned that he or it will comply with the laws of the State of Arkansas and all regulations issued pursuant thereto in respect to the transportation of liquor through this State in interstate commerce, and conditioned further that in the event said contract or private carrier violates any of the terms and provisions of such laws and regulations including the permit issued to him or it, then the entire penalty of such bond shall be forfeited to the Commissioner of Revenues.

Upon compliance with the above requirements, the Commissioner of Revenues may issue a permit for the purpose stated, which permit shall contain the information furnished in the application and which shall be placed by the permittee in a conspicuous place in or on the cab of the vehicle containing such shipment.

Such permits as are provided for herein shall be issued only in those cases or instances where such contract or private carrier shall enter the State at points known as 'ports of entry' where there is a regularly established revenue inspector's station.

Such permits shall require that the contract or private carrier report to such revenue inspector at the time of entry into this State and allow such inspector to examine and check his shipment.

Upon leaving the State of Arkansas after making such shipment the contract or private carrier shall be required by such permit and by these regulations to report either to the revenue inspector at the boundary line of the State or to the nearest county revenue inspector of the county where the shipment leaves the State, in which instances the

Revenue inspector or county revenue inspector shall also check his permit and make an inspection of the shipment of spirituous liquors.

All such revenue inspectors at ports of entry as above described and the county revenue inspectors at points where such shipments leave the State shall carefully check the permit of such vehicle and the cargo of liquor contained in it, and shall furnish to the Commissioner of Revenues a record of every such permit and shipment that he is required by these regulations to check and inspect.

Every such contract or private carrier making application for a permit to transport such liquor through the State of Arkansas shall procure from the Motor Vehicle Division of the Department of Revenue an Arkansas license for every such vehicle used in making such shipments according to the rates and fees established by such division for such vehicle.

Any failure on the part of such contract or private carrier, after obtaining such permit, to report to the Revenue inspector at the point of entry into this State and at the point where such shipment leaves the State and offers his vehicle for inspection, shall be presumed to be a violation of such permit and these regulations and shall work a forfeiture of the bond herein provided for.

Also any storage, delivery or sale, or attempt to store, deliver or sell any such liquors included in such shipments within the State of Arkansas shall be deemed a violation of said permit and those regulations which shall result in a forfeiture of said bond to the Commissioner, in addition to other penalties provided by law.

Where such shipment is a casual or isolated shipment a separate permit shall be required for each shipment for which a fee of $25.00 shall be col-

lected from said carrier. Where such carrier operates on a regularly established schedule, a blanket permit covering a period of one year may be issued, for which a fee of $50.00 shall be collected. Provided that in any instance, such carrier shall procure a separate permit for each and every vehicle used in making such shipments.

JOE HARDIN,
Commissioner of Revenues.

Date:
February 3, 1941.

BEVERAGE DIVISION

SUPPLEMENTAL REGULATION NO. 32 PROMULGATED BY THE COMMISSIONER OF REVENUES TO EXTEND THE PROVISIONS OF SUPPLEMENTAL REGULATION NO. 31 TO INCLUDE THE TRANSPORTATION IN INTERSTATE COMMERCE OF VINOUS LIQUORS, BEER AND MALT BEVERAGES.

Hereafter, any contract or private carrier may apply to the Commissioner of Revenues for the issuance of a permit for the transportation in interstate commerce for vinous liquors, beer and malt beverages in the same manner and only for the purposes stated and described in Supplemental Regulation No. 31, issued and effective on February 3, 1941 by the Commissioner of Revenues, providing for permits for the transportation of spirituous liquors.

The same fees provided for and required in said Supplemental Regulation No. 31 shall also be charged and collected from such contract or private carrier who may apply for a permit or permits hereunder.

All of the fees collected and paid to the Commissioner of Revenues under Supplemental Regula-

tion No. 31, and this Regulation, shall be credited to liquor permits, wine permits, and beer permits, respectively, according to the type of beverage in the shipments for which such permits were issued.

JOE HARDIN,
Commissioner of Revenues
for State of Arkansas.

Effective:
February 3, 1941."

The Wilson Act (Title 27, Sec. 121, U.S.C.A., 26 Stat. 313.

"121. STATE STATUTES AS OPERATIVE ON TERMINATION OF TRANSPORTATION; ORIGINAL PACKAGES. All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. (Aug. 8, 1890)"

The Webb-Kenyon Act (Title 27, Sec. 122, U.S.C.A. 37 Stat. 699, 49 Stat. 877).

"122. SHIPMENTS INTO STATES HAVING DRY LAWS; PROHIBITION. The Shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted fermented, or other intoxicating liquor of any kind, from one state, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States,

or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited. (Mar. 1, 1913)"

The Reed Amendment. (Title 27, Sec. 123, U.S.C.A. Repealed June 25, 1936. 49 Stat. 1930)

The Federal Liquor Enforcement Act of 1936 (Title 27, Sec. 223, U.S.C.A., 49 Stat. 1928)

"223. TRANSPORTING INTO STATE WHERE SALE PROHIBITED; PENALTY; STATE DEFINITION OF INTOXICATING LIQUOR ADOPTED.

(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation, of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000.00 or imprisoned not more than one year, or both.

(b) In order to determine whether anyone importing, bringing, or transporting intoxicating liquor into any state, or anyone attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter, the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited in such State. (June 25, 1936)"

Unreported Opinion of Tennessee Supreme Court, McCanless vs. Spiers, decided February 1, 1941.

FILED FEB. 1, 1941

DAVID S. LANSDEN, *Clerk*

GEORGE F. McCANLESS

COMMISSIONER, ETC.

V.

JACK SPIERS

DAVIDSON LAW

MEMORANDUM

In this case, involving confiscation by order of the Commissioner of Finance & Taxation, of a truck load of liquor being shipped across the State, from one foreign State to another, the judgment below is affirmed on the authority of George F. McCanless, Commissioner, vs. Grover Graham, Davidson Equity, decided January 11th, opinion by Mr. Justice McKinney.

CHAMBLISS,
Judge.

OFFICE OF CLERK OF THE SUPREME COURT
FOR THE MIDDLE DIVISION OF
THE STATE OF TENNESSEE

I, DAVID S. LANSDEN, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Memo Opinion of said Court, pronounced at its December term, 1940, in case of McCanless against Spiers as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 1st day of February, 1941.

DAVID S. LANSDEN, *Clerk.*

By ———————— D.C."

(SEAL)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~904~~ 43

JIM DUCKWORTH,

Appellant,

vs.

THE STATE OF ARKANSAS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

MOTION TO DISMISS.

JACK HOLT,
Attorney General of Arkansas,
JNO. P. STREEPY,
Assistant Attorney General of Arkansas,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 904

JIM DUCKWORTH,

Appellant,

vs.

THE STATE OF ARKANSAS,

Appellee.

MOTION TO DISMISS.

Comes the State of Arkansas, Appellee herein, by Jack Holt, her Attorney General, and Jno. P. Streepy, her Assistant Attorney General, and respectfully moves the Court to dismiss the appeal herein, for grounds alleging:

(1) Since the Supreme Court of the State of Arkansas, in construing Act No. 109 of the Acts of the General Assembly for the year 1935, found that permits to carry intoxicating liquor through and across the State must be issued by the State Revenue Commissioner to all alike, for a nominal amount, and further found that the State of Arkansas has the right to require such permits for the use of its roads, other facilities and the furnishing of Police inspections to prevent the unlawful dumping of liquor in the State, the incidental interference with Interstate Com-

merce does not violate Article I, Section 8, Paragraph 3, of the Constitution of the United States of America.

(2) In the absence of Congressional regulation of the transportation of intoxicating liquor in Interstate Commerce, the State of Arkansas, under its police power, can by statute act to protect its legitimate local interests in the regulation of Intrastate Commerce though interstate commerce is incidentally affected thereby.

Respectfully submitted,

(S.) JACK HOLT,
Attorney General of the State of Arkansas,
(S.) JNO. P. STREEPY,
Assistant Attorney General for Arkansas,
Counsel for Appellee.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 43

JIM DUCKWORTH ..... Appellant

Vs.

THE STATE OF ARKANSAS ..... Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLEE

JACK HOLT,
Attorney General.

JNO. P. STREEPEY,
Assistant Attorney General.
Counsel for Appellee.

IN THE

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JACK HOLT,
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JNO. P. STREEPEY,
Assistant Attorney General.
Counsel for Appellee.

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OCTOBER TERM, 1941

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THE STATE OF ARKANSAS ..... Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLEE

STATEMENT

Appellant was arrested on the 16th day of December, 1940, and charged in the Municipal Court of Blytheville, Arkansas, with the offense of transporting alcoholic liquor into the State without a permit in violation of Section 14177 of Pope's Digest. Appellant plead not guilty, and a trial was had. He was convicted and fined $500.00 and costs. He then appealed to the Circuit Court of Mississippi County, where his conviction was upheld, and then appealed from the Circuit Court to the Supreme Court of Arkansas. The

Supreme Court of Arkansas affirmed the decision of the Circuit Court of Mississippi County. This case is reported in the 201 Arkansas Reports, beginning at page 1123, and in the 148 S. W. (2d), beginning at page 656.

The case was submitted in the Circuit Court on a stipulation whereby it was agreed that Eddie B. David, an Arkansas State Policeman, would, if present, testify that he arrested appellant in Mississippi County, Arkansas, December 11, 1940; that appellant was driving a 1940 Chevrolet truck and that it contained 100 cases of liquor; that the truck was displaying an Arkansas license tag but that he found Mississippi license tags under the floor mat in the front compartment of the truck. He also found four half pints of liquor, partly consumed, in the glove compartment of the truck. The liquor carried no Arkansas Revenue liquor stamps or other state liquor stamps, the only stamps on any of the liquor being United States Revenue stamps. He also found an invoice for the liquor, billing it to Jack Spiers, Columbia, Mississippi. He would testify that the truck was proceeding in a southerly direction and that appellant informed him that he was en route to Columbia, Mississippi, with the shipment. He also informed the witness that the liquor had been purchased at Cairo, Illinois, and that he was driving for Spiers. He would also testify that appellant stated that he had made several trips with loads of liquor which had had no permit from the Revenue Department of Arkansas, and that he knew he was hauling liquor in violation of the Arkansas state law. The witness would also testify that he checked the records at the Statehouse and found the Arkansas license had been issued to Jack Spiers at Columbia, Mississippi.

It was also agreed that Jack Spiers, if present, would

testify that he was in the wholesale whiskey business at Club Marion in Columbia, Mississippi, and holds a Federal wholesale liquor dealer's permit; that he sent appellant from Columbia, Mississippi with instructions to purchase the whiskey from a licensed dealer in Cairo, Illinois; that no part of the whiskey was intended for sale, gift, distribution or other disposition within the State of Arkansas. He would also testify that the liquor was intended to be sold in Mississippi in violation of the State laws of Mississippi; that both he and appellant reside in Mississippi, and neither has any place of business in Arkansas.

There is but one question to be determined in this case and that is: May the State of Arkansas require transporters of liquor to obtain a permit to transport liquor into and across the State of Arkansas, even though they are transporting such liquor in interstate commerce?

POINTS TO BE ARGUED AND AUTHORITIES

1.

The Regulation Under Which Arkansas Acts

AUTHORITIES

1. *Jones vs. State,* 198 Ark. 354, 120 S. W. (2) 249.
2. Sec. 14177 Pope's Digest of the Statutes of Arkansas.
3. Act 108, Acts of Arkansas, 1935.

2.

The State May Incidentally Interfere With Interstate Commerce

AUTHORITIES

1. 11 Am. Jur. Sec. 94, p. 85.
2. *So. Car. etc. vs. Barnwell Bros.* 303 U. S. 177, 82 L. ed. 734, 58 S. Ct. 510.
3. *M. K. & T. Co. vs. Harris,* 234 U. S. 412, 34 Sup. Ct. Rep. 790, 58 L. ed. 1377.
4. California vs. Thompson, 85 L. ed. 793, 61 S. Ct. 930.

3.

The Interpretation of Section 14177 By the Supreme Court of Arkansas

AUTHORITIES

1. Sec. 14177 Pope's Digest of Arkansas.
2. *Duckworth vs. State,* 201 Ark. 1123, 148 SW. (2) 656.
3. *Hardin, Com., vs. Spiers,* 152 S. W. (2) 1010, 75 Ark. Law Rep. No. 2, p. 35.

ARGUMENT

1.

The Regulation Under Which Arkansas Acts

Appellant was found guilty of violating Section 14177 of Pope's Digest. This section of the Digest makes it unlawful for any person to ship or transport into the State of Arkansas any distilled spirits from without the state without first having obtained a permit from the State Commissioner of Revenues. It gives the Commissioner of Revenues power to prescribe the form of the permit.

This Section of Pope's Digest was first considered by the Supreme Court of Arkansas in the case of *Jones v. State*, 198 Ark. 354, 120 S. W. (2d) 249. In that case the Supreme Court of Arkansas held that Jones violated Section 14177 by transporting 50 cases of liquor, on which the Federal tax only had been paid, from Illinois through Arkansas to Oklahoma without first obtaining a permit from the Revenue Department of the State of Arkansas. In the case at bar appellant was convicted of transporting into Arkansas 190 cases of liquor from Illinois, which was destined for Columbia, Mississippi. The Federal tax had been paid, but no Arkansas Tax had been paid and no Arkansas permit to transport the liquor into this State had been obtained by appellant from the Commissioner of Revenues.

The stipulation of facts shows that in the glove compartment of the Chevrolet truck driven by appellant were four half pints of liquor. One of these was opened and some of the liquor had been taken out. The stipulation also shows that Jack Spiers who bought the liquor and who was having its transported to him at Columbia, Miss., would have testified, if he had been present, that none of the liquor was to be sold, given away or otherwise distributed in

Arkansas; that he would have testified on cross examination that the liquor was intended to be sold in Mississippi in violation of the laws of that State.

Arkansas took advantage of the 21st Amendment to the United States Constitution by legalizing the sale of liquor in this state. (Act 108, Acts of Arkansas for 1935). One of the problems that confronts the State in handling its liquor is to prevent the unlawful distribution of liquor by bootleggers. One of the reasons Arkansas has adopted Section 14177 of Pope's Digest is that it may have a check on the manner in which liquor moves into this State. In accordance with the authority of Section 14177 the Commissioner of Revenues promugated a rule requiring permits for shipment of liquors from without the state into the State of Arkansas. It was in effect during all of the month of December, 1940, when appellant was arrested, and reads as follows:

> "It shall be (fol. 25) unlawful for any person to ship, transport, cause to be shipped or transported into the State of Arkansas any distilled spirts from *points without the* state without having first obtained a permit from the commissioner of revenues, or his duly authorized agent." (Record - page 14).

Arkansas has spent many millions of dollars building through roads across the State and has provided for state police to give police protection, inspection, etc., on these roads. Section 14177 of Pope's Digest, as construed by the Supreme Court of the State of Arkansas in two cases, approves the right of the State to require persons transporting liquor into the State of Arkansas and across it on these through roads, to take out a permit from the State Commissioner of Revenues. One of the purposes in requiring such a permit is to enable the State of Arkansas to check

up on the bootleggers using the highway facilities of this State to see that they do not dump their stocks into the State of Arkansas and flood the State with bootleg liquor. Manifestly if such a permit requirement is valid the State Commissioner of Revenue could, when a permit is obtained, have a state policeman assigned to each shipment of liquor as it comes into and across the State and there would be no chance for anything to go wrong. It is otherwise if bootleggers and people transporting liquor may frequently cross the State without any supervision of their trips.

2.

The State May Incidentally Interfere With Interstate Commerce

As construed by the Supreme Court of Arkansas, Section 14177 of Pope's Digest, being the only section in our State law dealing with the movement of liquor into the State, was intended by the Legislature to cover all movements of liquor, not only those into the state and at rest but those into and across the state.

The general rule with reference to the right of the State under its police power to pass valid laws for the protection of the public health, morals and safety of its inhabitants has been stated as follows:

> "The police power of the states was not surrendered when general power to regulate commerce with foreign nations and among the several states was conferred upon Congress. Especially when so exercised as to be an aid to commerce, the states or their municipalities, in the exercise of the police power, may enact statutes and ordinances to protect the public health, the public morals, the public safety, and the public convenience—that is, they may adopt any leg-

islation or regulation for any of those purposes and relative to interstate or foreign commerce, provided such laws or ordinances are local in their character and affect interstate commerce incidentally only. * * *"

11 *Am. Jur. Sec.* 94, *Page* 85.

By Section 14177, the State provided for the protection of the health and safety of its inhabitants by prescribing the manner in which its highways were to be used; that is, by preventing the use of the highways for the transportation of liquor until the State could have a check upon it, and this regulation applies without discrimination to interstate and intrastate traffic. Congress has not acted on this particular matter. Therefore, the State had the right to control the movement of traffic over its highways, even though it burdened or impeded interstate commerce to some extent. One of the late cases has stated the rule as follows:

"The nature of the authority of the state over its own highways has often been pointed out by this Court. It may not, under the guise of regulation, discriminate against interstate commerce. But 'in the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use applicable alike to vehicles moving in interstate commerce and those of its own citizens.' Morris v. Duby, 274 U. S. 135, 143, 71 L. ed. 966, 971, 47 S. Ct. 548. This formulation has been repeatedly affirmed, Clark v. Poor, 274 U. S. 554, 557, 71 L. ed. 1199, 1200, 47 S. Ct. 702; Sprout v. South Bend, 277 U. S. 163, 169, 72 L. ed. 833, 836, 48 S. Ct. 502, 62 A. L. R. 45; Sproles v. Binford, 286 U. S. 374, 389, 390, 76 L. ed. 1167, 1179, 1180, 52 S. Ct. 581; cf. Morf. v. Bingaman, 298 U. S. 407, 80 L. ed.

1245, 56 S. Ct. 756, and never disapproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. It has upheld weight limitations lower than those presently imposed, applied alike to motor traffic moving interstate and intrastate. Morris v. Duby, 274 U. S. 135, 71 L. ed. 966, 47 S. Ct. 548, supra: Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581, supra. Restrictions favoring passenger traffic over the carriage of interstate merchandise by truck have been similarly sustained, Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581, supra; Bradley v. Public Utilities Commission, 289 U. S. 92, 77 L. ed. 1053, 53 S. Ct. 577, 85 A. L. R. 1131, as has the exaction of a reasonable fee for the use of the highways. Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140; Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551, 48 S. Ct. 230; Morf v. Bingaman, 298 U. S. 407, 80 L. ed. 1245, 56 S. Ct. 756, supra; cf. Ingels v. Morf, 300 U. S. 290, 81 L. ed. 653, 57 S. Ct. 439.

"In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states."

South Carolina, etc. v. Barnwell Bros., 303 U. S. 177, 189, 82 L. ed. 734, 741.

In an older case, the Supreme Court recognized the rule that statutes enacted under the police power of a State, where Congress has not acted, are not to be set aside un-

less there is a clear repugnancy. The rule has been announced thus:

> "These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. * * *"
>
> *Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412, 34 S. Ct. Rep. 790, 58 L. ed. 1377, _____.

One of the latest cases dealing with the right of states to regulate matters of local concern, with respect to which Congress has not acted, collects a great number of the Supreme Court cases on this question and announces the rule as follows:

> "As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. Ever since Wilson v. Black Bird Creek Marsh Co. 2 Pet. (US) 245, 7 L. ed. 412, and Cooley v. Port Wardens, 12 How (US) 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national

commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in Di Santo v. Pennsylvania, supra (273 US 40, 71 L. ed. 528, 47 S. Ct. 268)"

California v. Thompson, 85 L. ed. 793, 794.

3.

The Interpretation of Section 14177 By the Supreme Court of Arkansas

In the case at bar the Supreme Court of Arkansas stated that this section was not intended to be a revenue measure, but an inspection measure, and that only a nominal fee could be collected for a permit issued thereunder; that the failure of the Commissioner of Revenues to act reasonably and promptly would be controlled by the Courts through mandamus. (Record p. 20).

On July 7th of this year, the Supreme Court of Arkansas again considered Section 14177 of Pope's Digest and reaffirmed its holding in the case at bar (Duckworth vs. State, 201 Ark.), as to the constitutionality of this section. In the new case (Hardin, Commissioner of Revenues v. Spiers) the Supreme Court showed that it intended to see that shippers of liquor in interstate commerce, who complied with the requirements of Section 14177, as interpreted by the Supreme Court of Arkansas, were not to be treated in an arbitrary or discriminatory manner. The Court ruled as follows:

"* * * The Commissioner of Revenues has the power to designate at what times, and from what places, and over what highways, he will permit cargoes of spirituous liquors to leave the state; but this power must be exercised in a reasonable—and not in an arbitrary—manner. Having exercised that power, the Commissioner should have afforded the shipper a reasonable opportunity to conform to and to comply with his regulations. On the other hand, the shipper must make a reasonable and good faith attempt to comply with the regulations. He would not, for instance, be allowed to drive through and out of the state, even though he presented his truck for inspection within the designated hours, because the inspector had temporarily stepped aside and was not immediately available."

Hardin, Commissioner of Revenues v. Spiers, 152 S. W. (2d) 1010, 75 Ark. Law Rep. No. 2, p. 35.

Respectfully submitted,

JACK HOLT,
Attorney General.

JNO. P. STREEPEY,
Assistant Attorney General.
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 43.—October Term, 1941.

Jim Duckworth, Appellant, *vs.* The State of Arkansas.	Appeal from the Supreme Court of the State of Arkansas.

[December 15, 1941.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Appellant was convicted and fined by an Arkansas court for transporting intoxicating liquor through the state without a permit as required by an Arkansas statute. The question for decision is whether this statutory requirement and its penal sanction unduly encroach upon the power over interstate commerce delegated to Congress. The Arkansas Supreme Court sustained the requirement of the permit as a local police regulation permissible under the commerce clause. 201 Ark. 1123. The case comes here on appeal under the provisions of § 237(a) of the Judicial Code, 28 U. S. C. § 344(a), § 861(a)(b).

Section 14177, Pope's 1937 Digest of Arkansas Statutes, § 5, Act 109 of 1935, under which appellant was convicted, makes it unlawful for any person to ship into the state any distilled spirits without first having obtained a permit from the state commissioner of revenue. The statute provides that the form of permit and the shipments into the state shall be governed by rules and regulations promulgated by the commissioner. Appellant was tried upon a stipulation of facts which tended to show that when arrested in Arkansas he was engaged in transporting by motor truck, without a permit, a load of distilled spirits from a point in Illinois to a point in Mississippi. The state court held that this violated § 14177. At the time of the offense there were no regulations specifically applicable to transportation passing through the state, the regulations then in force being adapted to transportation for delivery within the state or from point to point within the state.

We have no occasion to decide whether the Arkansas statute, when applied to transportation passing through that state for delivery or

use in another, derives support from the Twenty-first Amendment, which prohibits the "transportation or importation" of intoxicating liquors "into any state . . . for delivery or use therein" in violation of its laws, cf. *United States* v. *Gudger*, 249 U. S. 373. Nor need we decide whether appellant's admission that the transported liquor was intended for importation into Mississippi for illegal use there establishes a violation of the Twenty-first Amendment while he was in Arkansas, so as to deprive him of the right to seek protection of the commerce clause on his journey through Arkansas, cf. *McFarland* v. *American Sugar Ref. Co.*, 241 U. S. 79, 84-5. We may also assume that appellant's admission no more deprives him of the right to invoke the protection of the commerce clause against the Arkansas statute than did intended violation by the importer of the liquor laws of the state of destination before the adoption of the Webb-Kenyon Act, 37 Stat. 699, and the Twenty-first Amendment. See *Bowman* v. *Chicago, etc. Ry.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100. For we are of the opinion that upon principles of constitutional interpretation consistently accepted and followed by this Court ever since the decisions in *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley* v. *Board of Wardens*, 12 How. 299, the commerce clause does not foreclose the Arkansas regulation with which we are now concerned.

The commerce here is transportation alone, there being no question of sale or use within the state of regulation. We may therefore put to one side the cases in which local restrictions or prohibitions on sale or use of intoxicating liquor or other articles of commerce, unaided by Acts of Congress, have been deemed a prohibited burden on interstate commerce, see *Bowman* v. *Chicago, etc. Ry.*, *supra*; *Leisy* v. *Hardin*, *supra*. The present scheme of regulation is narrower in operation and has a less restrictive effect upon the commerce. It does not forbid the traffic in liquor, nor does it impede it more than is reasonably necessary to inform the local authorities who is to effect the transportation through the state, and to afford opportunity for them to police it.

The Arkansas Supreme Court in this case has declared that under the statute appellant was entitled to a permit on application, which he does not appear to have made; that the permit requirement is in its nature an inspection measure for which only a nominal fee, necessary to defray the cost of issuing it and of police inspection and of

necessary reports, is charged.[1] It also said that any failure by the state commissioner to act reasonably and promptly in administering the law would be controlled by the courts through mandamus. In a later case, *Hardin, Commissioner* v. *Spiers*, 152 S. W. 2d 1010, arising under regulations not in force at the time of appellant's conviction, the same court declared that the commissioner must exercise this power in a reasonable, not an arbitrary manner.

While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce. As we had occasion to point out at the last term of Court, there are many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character also there is wide scope for local regulation without impairing the uniformity of control over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, in the absence of supervening Congressional action, have for the most part been sustained by this Court, notwithstanding the commerce clause. *See California* v. *Thompson*, 313 U. S. 109, 113, *et seq.* and cases cited. *See* also cases collected in *DiSanto* v. *Pennsylvania*, 273 U. S. 34, 39, 40, and in *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 188, Note 5, and 191.

In the cases referred to the Court has sustained a variety of local regulations designed to safeguard the states from injurious local effects that may attend interstate transportation. Familiar examples are inspection and quarantine laws for the protection of

[1] The regulations promulgated by the commissioner on February 3, 1941, after appellant's conviction, provided for the payment of a license fee for the permit. It does not appear that there was any prescribed fee at the time of appellant's offense. Moreover, his sole contention is that the commerce clause precludes the state from exacting any form of permit, either with or without a fee, for the interstate transportation of liquor through the state.

local health and safety, applicable to persons, animals, and merchandise moving in interstate commerce. Again, a state may insure the safe and convenient use of its harbors and navigable waterways by controlling the movement of vessels in interstate and foreign commerce; in the interests of safety it may control the operations of interstate trains and of their employees and appliances.

Of recent years the Court has sustained state regulations of the size and weight of motor cars moving interstate, designed to insure the safe and economical use of the states' highways. *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* and cases cited. A state may police "caravans" of motor vehicles moving over its highways in interstate commerce and charge a compensatory license fee for doing it. *Morf* v. *Bingaman,* 298 U. S. 407; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583. It may, in the interest of public safety and convenience, restrict particular types of motor vehicles moving in interstate commerce to particular areas. *Sproles* v. *Binford,* 286 U. S. 374, 393-5; cf. *Clark* v. *Paul Gray, Inc., supra,* 598. And a state may undertake to insure the fitness and integrity of those negotiating contracts for interstate transportation, by licensing them and requiring a bond to insure their good behavior. *California* v. *Thompson, supra.*

While the subject matter of the present regulation, transportation of liquor, with its attendant dangers to the communities through which it passes, differs in many respects from those which we have mentioned, all are alike in their tendency, if unregulated, to affect the public interest adversely in varying ways depending on local conditions. The efforts at effective regulation, state and national, of intoxicating liquor, evidenced by the long course of litigation in this Court, have not left us unaware of the peculiar difficulties of controlling it or of its tendency to get out of legal bounds. The present requirement of a permit is not shown to be more than a means of establishing the identity of those who are to engage in the transportation, their route and point of destination, and affords opportunity for local officials to take appropriate measures to insure that the liquor is transported without diversion, in conformity to the permit. The permit device is not unlike state requirements of health certificates for animals or certificates of inspection for goods, which have been sustained here both as to transportation into a state, *Savage* v. *Jones,* 225 U. S. 501, 528; *Mintz* v. *Baldwin,* 289 U. S. 346; and through it *Reid* v. *Colorado,* 187 U. S. 137; cf. *Morf* v. *Bingaman,*

supra. Where the power to regulate commerce for local protection exists, the states may adopt effective measures to accomplish the permitted end. The Arkansas statute does not conflict with any act of Congress. It does not forbid or preclude the transportation, or interfere with the free flow of commerce among the states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state. It does not violate the commerce clause. Cf. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132.

What we have said is restricted to the statute as applied under the regulations in force at the time of petitioner's alleged offense. It will be time enough to deal with abuses of the permit system if and when they arise. Nor have we occasion to consider the state's authority to regulate other articles of commerce less susceptible to uses injurious to the communities through which they pass. Cf. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 332; *Ziffrin, Inc.* v. *Reeves*, *supra*, 138.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 43.—October Term, 1941.

Jim Duckworth, Appellant, *vs.* The State of Arkansas	Appeal from the Supreme Court of the State of Arkansas.

[December 15, 1941.]

Mr. Justice Jackson, concurring in result.

I agree that this Court should not relieve Duckworth of his conviction, but I would rest the decision on the constitutional provision applicable only to the transportation of liquor, and refrain from what I regard as an unwise extension of state power over interstate commerce.

I.

Appellant was convicted for transporting a load of intoxicating liquor through Arkansas without permit from that State on the way from Illinois to Mississippi. The owner of the liquor testified, and his testimony was treated as a stipulation of fact, "that the liquor was intended to be sold in the State of Mississippi in violation of the state laws of Mississippi."

The Twenty-first Amendment provides:

"The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Duckworth now contends that it is our duty to assure him safe conduct as against the action of Arkansas, although his goal is to violate both the laws of Mississippi and the Federal Constitution. He asks us to hold that one provision of the Constitution guarantees him an opportunity to violate another. The law is not that tricky.

Whether one transporting liquor across Arkansas to a legal destination might not have some claim to federal protection, we do not need to consider. One who assails the constitutionality of a statute

must stand on his own right to relief.[1] Since this appellant had no rightful claim to constitutional protection for his trip, the whole purpose of which was to violate the Constitution which he invokes, we should leave him where we find him, and for this reason I concur in the judgment of this Court affirming the conviction.

II.

If we yield to an urge to go beyond this rather narrow but adequate ground of decision, we should then consider whether this liquor controversy cannot properly be determined by guidance from the liquor clauses of the Constitution. These clauses of the Twenty-first Amendment create an important distinction between state power over the liquor traffic and state power over commerce in general. The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular Constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's "tendency to get out of legal bounds." It was their unsatisfactory experience with that method that resulted in giving liquor an exclusive place in constitutional law as a commodity whose transportation is governed by a special constitutional provision.

Transportation itself presented no special dangers or hazards, but it might be a step in evading and undermining a policy as to use and sale of liquor which the state has a right to prescribe for itself. Regulated transportation of liquor is a necessary incident of regulated consumption and distribution. So the Twenty-first Amendment made the laws as to delivery and use in the state of

[1] Mr. Justice Holmes, speaking for a unanimous Court, laid down the rule as to tax cases equally applicable to this if, indeed, this is not itself something of a tax case. He pointed out that the Court does not consider arguments on constitutional grounds "unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected . . . ." Hatch *v.* Reardon, 204 U. S. 152, 160.

Mr. Justice Cardozo has stated for the Court that those who attack the constitutionality of state statutes "are not the champions of any rights except their own." Henneford *v.* Silas Mason Co., 300 U. S. 577, 583.

Mr. Justice Brandeis has given expression to the same view for the Court in these terms:

"We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him." Premier-Pabst Co. *v.* Grosscup, 298 U. S. 226, 227.

destination the test of legality of interstate movement. This obviously gives to state law a much greater control over interstate liquor traffic than over commerce in any other commodity.

If the Twenty-first Amendment is not to be resorted to for the decision of liquor cases, it is on the way to becoming another "almost forgotten" clause of the Constitution. Compare *Edwards* v. *California*, decided November 24, 1941. It certainly applies to nothing else. We should decide whether this Arkansas statute is sustainable under the Twenty-first Amendment. Does it authorize a state to exact some assurance that all liquor entering its territory either is imported for lawful delivery under its own laws or will pass through without diversion? The Amendment might bear a construction that would allow a state to prohibit liquor from entering its borders at all unless by responsible carrier under consignment to some lawful destination within or beyond the state. I should not at all object to considering all of the potential evils which the Court's opinion associates with the liquor traffic, and some more that I could supply, to be sufficient reasons for giving a liberal interpretation to the Twenty-first Amendment as to state power *over liquor*. But the Court brushes aside the liquor provisions of the Twenty-first Amendment.

III.

The opinion of the Court solves the present case through a construction of the interstate commerce power. It regards this liquor as a legitimate subject of a lawful commerce, and then, because of its special characteristics, approves this admittedly novel permit system and thus expands the power of the state to regulate such lawful commerce beyond anything this Court has yet approved.

The extent to which state legislation may be allowed to affect the conduct of interstate business in the absence of Congressional action on the subject has long been a vexatious problem. Recently the tendency has been to abandon the earlier limitations and to sustain more freely such state laws on the ground that Congress has power to supersede them with regulation of its own. It is a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. But these restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters. The practical

result is that in default of action by us they will go on suffocating and retarding and Balkanizing American commerce, trade and industry.

I differ basically with my brethren as to whether the inertia of government shall be on the side of restraint of commerce or on the side of freedom of commerce. The sluggishness of government, the multitude of matters that clamor for attention, and the relative ease with which men are persuaded to postpone troublesome decisions, all make inertia one of the most decisive powers in determining the course of our affairs and frequently gives to the established order of things a longevity and vitality much beyond its merits. Because that is so, I am reluctant to see any new local systems for restraining our national commerce get the prestige and power of established institutions. The Court's present opinion and tendency would allow the states to establish the restraints and let commerce struggle for Congressional action to make it free. This trend I am unwilling to further in any event beyond the plain requirements of existing cases.

If the reaction of this Court against what many of us have regarded as an excessive judicial interference with legislative action is to yield wholesome results, we must be cautious lest we merely rush to other extremes. The excessive use for insufficient reason of a judicially inflated due process clause to strike down states' laws regulating their own internal affairs, such as hours of labor in industry, minimum wage requirements, and standards for working conditions, is one thing. To invoke the interstate commerce clause to keep the many states from fastening their several concepts of local "well-being" onto the national commerce is a wholly different thing.

Our national free intercourse is never in danger of being suddenly stifled by dramatic and sweeping acts of restraint. That would produce its own antidote. Our danger, as the forefathers well knew, is from the aggregate strangling effect of a multiplicity of individually petty and diverse and local regulations. Each may serve some local purpose worthy enough by itself. Congress may very properly take into consideration local policies and dangers when it exercises its power under the commerce clause. But to let each locality conjure up its own dangers and be the judge of the remedial restraints to be clamped onto interstate trade inevitably retards our national economy and disintegrates our national so-

ciety. It is the movement and exchange of goods that sustain living standards, both of him who produces and of him who consumes. This vital national interest in free commerce among the states must not be jeopardized.

I do not suppose the skies will fall if the Court does allow Arkansas to rig up this handy device for policing liquor on the ground that it is not forbidden by the commerce clause, but in doing so it adds another to the already too numerous and burdensome state restraints of national commerce and pursues a trend with which I would have no part.